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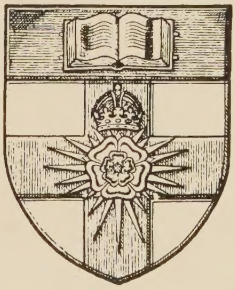

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Privy Council Appeals.

CASES

HEARD AND DETERMINED BY

THE JUDICIAL COMMITTEE

AND THE

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY EDMUND F. MOORE, ESQ., M.A.,
ONE OF HER MAJESTY'S COUNSEL.

VOL. II.—1867–9.

LONDON:
PRINTED FOR THE COUNCIL OF LAW REPORTING
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14 CHARING CROSS.
PUBLISHING OFFICE, 51 CAREY STREET, LINCOLN'S INN, W.C.

1869.

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Page.	*Line.*	
120	1 from top,	*for* "Mr. *Hulme*" *read* "Mr. *Ayrton*."
191	10 from bottom,	*for* "Respondent" *read* "Appellant."
193	7 from bottom,	*for* "Barque" *read* "Steamer."
374	14 from bottom,	*for* "Mr. *E. Charles*" *read* "Mr. *Arthur Charles*."
386	7 from bottom,	*for* "rights" *read* "rites."
388	16 from top,	*for* "right" *read* "rite."

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BEFORE THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

In re McDOUGAL'S PATENT.

J. C.*
1867
Dec. 4, 5.

Letters Patent—Subject matter known chemical substances in combination, in common use before and after grant—Validity of—Prolongation of term, conditions necessary to establish.

Part 57

It is essential, in order to obtain an extension of the term of Letters Patent, for the Petitioner to establish (1) that the invention is of considerable merit; (2) public utility; and (3) inadequate remuneration.

Although the Judicial Committee will not adjudicate upon the validity of Letters Patent, the term of which is sought to be prolonged, yet where it appears from the specification that the subject matter is not sufficient to sustain such Patent, they will not, in the exercise of their discretion, recommend the Crown to extend the term.

Where, therefore, the specification of a Patent described it as improvements in treating, deodorising and disinfecting, sewage and other offensive matter, and also for deodorising and disinfecting in general, and as being composed of two ordinary well-known chemical acids in combination, such acids being in common use for disinfecting purposes by the public before and after the Letters Patent:—*Held*, not to be an invention of such merit and utility as to justify an extension, to the detriment of the public in the use of known sanitary agents.

THE Petitioner, *McDougal*, and Dr. *Angus Smith* were joint Patentees of a Patent granted to them on the 20th of January,

* *Present:*—Sir William Erle, Sir James William Colvile, Sir Edward Vaughan Williams, and Sir Richard Torin Kindersley.

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1854, described as "Improvements in treating, deodorising, and disinfecting, sewage and other offensive matter, which said improvements are also applicable to deodorising and disinfecting in general." Dr. *Angus Smith* afterwards assigned his interest in the Patent to the Petitioner.

The petition, in substance, stated that the invention was of great public utility, and greatly beneficial to the public health, and had been extensively used by the Government, Corporate and other public bodies in public works; that it was the result of a series of experiments made by the Petitioner and Dr. *Angus Smith*, arrived at after great expense of time and labour, with a view to the removal of all offensive smells from sewage and other offensive matter, and the separation or preservation of such part of them as were useful as manure; and starting with the fact, that the gaseous emanations from fœcal and other organic matter were sulphuretted hydrogen and phosphuretted hydrogen, either free or in combination with ammonia, and that the fertilizing elements to be preserved were phosphoric acid and ammonia, they discovered that the conditions of the case could be met by means of a compound which should contain two acids, namely, sulphurous acid and carbolic acid, and two bases, namely magnesia and lime, the four forming together two salts, sulphate of magnesia and carbolate of lime. That in cases where the manure or other matter was in a very advanced state of decomposition and contained a larger percentage of ammonia, the Patentees found it would be useful to add a soluble phosphate, so that sufficient phosphoric acid might be present to form the triple compounds. That, in short, all the conditions of the case were fulfilled by using sulphurous acid to remove offensive smells, carbolic acid to remove putrefaction, a little lime to neutralize and dry the carbolic acid, and magnesia to combine with and preserve the phosphoric acid and ammonia, and, in special cases, a soluble phosphate to prevent the loss of any of the ammonia. That such combination produced a fine, dry powder, exceedingly simple to use, and adapted both for use in large operations with sewage, or in Stables and Cattle sheds, and also for use in sick rooms, nurseries, and offices. And the petition further alleged, that although the Government departments had adopted his invention, yet he had not been repaid for the time

J. C. 1867

In re McDougal's Patent.

and money spent in the introduction of an invention so important and of such practical utility, and prayed for an extension of fourteen years.

Mr. *Grove*, Q.C., and Mr. *Lawson*, for the Petitioner.

Mr. *Hannen* appeared for the Crown.

Their Lordships, after hearing the evidence of the Petitioner, from which it appeared that his invention was generally for deodorising and disinfecting sewage and other offensive matters, by means of a compound of sulphurous acid and carbolic acid; and that there had not been any adequate remuneration for the invention, as, although the public largely used the chemical substances contained in the Patent for disinfectant and other purposes, they refused to buy the patented article, stopped the case.

Sir William Erle:—

I am instructed by their Lordships to say, that they will not trouble you, Mr. *Hannen*, to proceed with your cross-examination of the Petitioner, who has tendered himself as a witness.

This is an application to the Judicial Committee, under its statutable jurisdiction, for the extension of the term of a Patent; and it is clear that that extension ought not to be granted unless their Lordships are satisfied that the original invention is of considerable merit, that it is of public utility, and that there has been inadequate remuneration.

It is not the duty of the Judicial Committee upon such an application to adjudicate upon the validity or invalidity of the Patent itself (1), but they must, in deciding whether the above conditions have been established, ascertain the meaning of the specification. Their Lordships, in this case, have no intention to put a construction upon it, as would be necessary in the case of hostile litigation —but they have considered the description of the invention given by the Petitioner's Counsel, and they are of opinion, that the specification does not contain the grant of an invention, such as has been described by Mr. *Grove*. They have also heard the evidence given by the Petitioner himself, and they are of opinion, that the specifi-

(1) See *Kay's Patent*, 3 Moore's P. C. Cases, 24, where an extension was granted pending a suit in respect of the validity of the Patent.

J. C. 1867 *In re* McDougal's Patent.

cation does not contain an invention such as has been described by the Petitioner himself in support of his own petition. Whatever may be the invention intended to be patented by him and Dr. *Angus Smith*, we have considered it with reference to the evidence, and with reference to the construction of the specification itself, and we are of opinion, that the restriction by Patent from general use, of the combination of the articles referred to, namely, sulphurous acid or carbolic acid, in the mode described, as producing very important effects, would be a great public detriment; and we do not discover in the invention such merit and utility as should induce us to grant an extension of the monopoly asked for, producing, as it might, so much detriment to the public in the use of an antidote to a species of plague. Therefore, this being entirely a matter for the discretion of their Lordships, we are not inclined to recommend to Her Majesty that any extension of this Patent should be granted.

Solicitor for the Petitioner: *J. Henry Johnson.*
Solicitors for the Treasury, for the Crown.

J. C.* 1867 *Dec.* 13.

JEAN BAPTISTE RENAUD . . . . . APPELLANT;

AND

JOSEPH GUILLET, DIT TOURANGEAU . . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH OF LOWER CANADA.

Lower Canada, law of—Will—Devise of immoveables—Restraint on alienation or incumbrance.

5 PC 80 383

A Testator, in *Lower Canada*, by his Will, devised and bequeathed his moveable and immoveable property, in specified portions, to his children, and directed that they should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the immoveables being in their respective lots, as devised by the Will, until the period of twenty years from his death.

Part of the immoveable property so devised to one of the children, who had

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* *Present*:—LORD ROMILLY (THE MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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confessed judgment in favour of a creditor, was seized by the Sheriff in execution. The Court of Queen's Bench, on appeal, reversing the decision of the Judge of the Superior Court, held that the restriction in the Will was valid according to the law in force in *Lower Canada*. Such decision reversed by the Judicial Committee, as being contrary to the general principles of jurisprudence as well as the old French Law prevailing in *Lower Canada*, founded on the Civil Law.

THE Appellant was a judgment creditor of the Respondent. The appeal was brought to decide the right to certain lands and tenements in possession of the Respondent which were taken in execution by the Sheriff of *Quebec*, under a writ of *Fieri Facias* issued upon the Appellant's judgment, under the following circumstances.

The Respondent, on the 29th of November, 1856, confessed judgment in favour of the Appellant for the sum of £1,884. 18*s.* 3*d.* On the 6th of April, 1859, a writ of *Fieri Facias* was issued against the Respondent for the sum of £1,892. 14*s.* 5*d.*, being the amount of principal, interest, and costs due upon this judgment, under which execution the sum of £105. 15*s.* 4*d.* was levied and paid to the Appellant. On the 23rd of November, 1860, a writ of *Alias Fieri Facias* was issued against the Respondent to recover the sum of £1,782. 9*s.* 9*d.*, being the balance then due on the judgment, and under that writ the Sheriff seized the lands and tenements of the Respondent in question in this appeal. The Respondent filed an opposition *afin d'annuller* to the seizure, alleging that the property had come to him under the Will of his Father, and that by a clause in the Will it was expressly directed that the Testator's children should not in any way incumber, affect, mortgage, sell, exchange, or otherwise alienate the immoveables being in their respective lots, under the Will, until after twenty years from the death of the Testator; that the Testator died in the year 1855, and that the lands and tenements, therefore, could not be charged or alienated by the Respondent, and were not liable to seizure.

The clause in question was as follows: "*Quatorzièmement.—Je veux et j'ordonne expressément que mes dits enfans ne puissent en aucune manière engager, affecter, hypothéquer, vendre, échanger ou autrement aliéner les biens immeubles étant dans leurs lots respectifs d'après les deux partages que j'en ai faits comme ci-dessus, qu'après vingt ans à compter du jour de mon décès, sous peine de nullité de*

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tous actes qu'ils feront contraires à mon intention à l'exception toutefois de l'emplacement situé en la paroisse de St. Roch de Québec, sur le niveau nord de la Rue des Fossés, et décrit en le présent testament, dont le détenteur et possesseur pourra disposer en toute propriété quand et comme bon lui semblera du jour de mon décès."

The Appellant filed a *défense au fonds en droit*, and an exception *péremptoire* to the opposition. The *défense au fonds en droit* was first argued, and on the 5th of May, 1862, the Judge of the Superior Court (Mr. Justice *Taschereau*), gave judgment in the Appellant's favour, on the ground that the clause in the Testator's Will prohibiting alienation was void according to the Canadian Law, and dismissed the opposition with costs.

From this judgment the Respondent appealed to the Court of Queen's Bench, consisting of Justices *Aylwin, Duval, Meredith, Mondelet,* and *Berthelot,* which Court, on the 16th of March, 1863, reversed the decision of the Superior Court, on the ground that the restriction being limited to twenty years was valid (Mr. Justice *Duval* and Mr. Justice *Meredith* dissenting), and remitted the record to the Superior Court.

The Appellant applied for leave to appeal therefrom to Her Majesty in Council, but leave was refused, on the ground that the proceeding was interlocutory.

On the 16th of October, 1863, the Appellant, by leave of the Court, filed a *défense au fonds en fait,* and also an amended exception *perpetuelle,* which alleged that by a contract of marriage made between *Joseph Guillet, dit Tourangeau,* the elder and *Judith Kenmer, dit Laflamme,* it was agreed that there should be between them a community of goods according to the custom of *Paris,* that the lands and tenements in question formed part of the possessions so held in common by them, that *Judith Kenmer, dit Laflamme,* died before her husband, and by her Will left her share of the property absolutely to her children, of whom the Respondent was one, and that, therefore, if the clause in the Will of *Joseph Guillet, dit Tourangeau,* the elder were valid and of force, which the Appellant by the exception denied, it could only affect the one-half of the property which passed by that Will, and that as to the other half of the property the opposition should be dismissed.

To the above exception the Respondent filed a special answer

which alleged—first, that by a deed, dated the 25th of November, 1856, he had conveyed all the profits of the houses and lands in question that should accrue within twenty years from the decease of his Father, and to which he was entitled under the Will of his Father, to the Appellant, who had accepted the same, and had thereby recognised the Will of *Joseph Guillet, dit Tourangeau,* the elder; secondly, that subsequently to the seizure of the lands in question the Appellant had taken in execution and sold goods of the Respondent to the value of £3,000, which had come to him under the Will of his Father, and the division of property made in accordance therewith, and that the Appellant having so recognised the Will of *Tourangeau,* and the partition of goods thereunder, and having received advantage under it, was not entitled now to dispute its effect; thirdly, that if the provisions of the Will of *Tourangeau* were not to be carried out with respect to the lands, the Appellant should first have compelled a new division of the property, under the respective Wills of *Tourangeau* and his wife, between their children, and that if such division had been made the Respondent would have received a much smaller share of the property, to the injury equally of the Appellant and his other creditors. Upon this answer issue was joined.

The cause was heard upon the merits on the 10th and 11th of March, 1864, before the Hon. Mr. Justice *Taschereau,* who, on the 15th of April, 1864, gave judgment for the Appellant, on the same grounds as those expressed in his former judgment, stating that the judgment of the Court of Queen's Bench having been interlocutory and an appeal to Her Majesty in Council refused on that ground, the judgment was not binding on him, and that he adhered to his former judgment.

From this judgment the Respondent again appealed to the Court of Queen's Bench, consisting of the Chief Justice *Duval,* Justices *Aylwin, Meredith, Drummond,* and *Mondelet,* when the majority of the Court were of opinion that the judgment of the Court below, as to the invalidity of the restriction contained in the Will in question, was well founded, but, on the 20th of September, 1865, the Court of Queen's Bench gave judgment for the then Appellant, on the ground that the former judgment of the Court of Queen's Bench was binding between the parties, subject

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only to revision by Her Majesty in Council, and, with respect to his amended exception, that the seizure was void, being made of whole of the tenements.

From this judgment Mr. Justice *Meredith* dissented. Mr. Justice *Mondelet* also dissented from so much of the judgment as decided that the former judgment of the Court of Queen's Bench was binding upon the Superior Court.

The Justices *Aylwin*, *Berthelot*, and *Meredith*, transmitted their opinions and reasons for their respective judgments.

Mr. Justice *Aylwin*, after stating the facts and the judgments of the 5th of May, 1862, and the 16th of March, 1863, stated his opinion in these terms:—"I am of opinion, that this latter judgment is correct, and that the judgment of the Superior Court was wrong, inasmuch as the last relied upon the law of *France* exclusively, without reference to the law of *Lower Canada*, which is the governing law. The *considérant* or reasons given by Mr. Justice *Taschereau*, who decided the cause in the first instance, appeared to me to be insufficient. First, because it is stated, that '*la défense d'aliéner contenue en telle clause du dit testament contient une défense d'aliéner qui ne peut en loi produire d'effet sérieux et doit plutôt être considérée comme renfermant un conseil plutôt qu'une défense sérieuse d'aliéner.*' I cannot understand how a Will like that of the Testator, which forbids any and every alienation to be made within twenty years from the day of the death of the Testator, and directs that any and all deeds and instruments contrary to the intention of the Testator shall be null "*sous peine de nullité de tous actes qu'ils feront contraires à mon intention,*" can be interpreted as not being serious, and as merely conveying a simple counsel or advice to be followed or to be disregarded either by the Legatee or Devisee, or by a Creditor, as the case may be. Ever since the 41 Geo. 3, c. 4, in *Lower Canada* (Consolidated Statutes, c. 34, p. 321) we have an express enactment which altered the old French law. By sect. 2 of the Consolidated Statute it is declared 'that every person of sound intellect and of age, having the legal interest of his or her rights, may devise or bequeath by last Will and Testament, whether the same be made by a husband or wife in favour of each other, or in favour of one or more of their children, as the Testator sees

meet, or in favour of any other person or persons whatsoever, all and every their lands, goods, or credit, whatever be the tenure of such lands, and whether they be "*propres*," "*acquêts*," or "*conquêts*," without reserve, restriction, or limitation whatsoever.' I can only see the judgment of the Superior Court as directly contrary to the Statute. Under the old French law, a *défense d'aliéner*, if perpetual, without an entail or substitution, or an indication of another party who was to take the property bequeathed, and to carry out the condition which was broken by the Legatee, was regarded as null and void. But the doctrine of *Ricard* and *Pothier* had only reference to a perpetual or an unlimited *défense d'aliéner*, and had no relation to a temporary *défense* for a time limited (*Troplong*, "*Donations*," No. 271, *Demolombe*, vol. xviii. No. 294). Another *considérant* again appears to me to be erroneous; it is this: '*que la clause susdite ne peut être considérée comme léguant la propriété ou la possession des dits immeubles au Défendeur à titre d'alimens ou comme insaisissable à moins d'une stipulation expresse à cet egard;*' as to stipulation, it could not be found in a Will, but if it be a condition that the alienation during twenty years shall be null, and if it be the result, *ex vi termini*, that the property becomes *insaisissable*, the Will must carry out the bequest whatever may be the form; the substance, that is the intention of the Testator, must be carried out. In the words of the judgment in appeal, it is more correct to say that '*la prohibition d'aliéner doit être réputée equivaloir à une clause d'insaisissabilité temporaire.*' So much, then, with reference to the first judgment. I come now to the judgment of the Superior Court of the 5th of May, 1862, by Judge *Taschereau*, upon which the same appeal has been brought; which is the judgment of the 20th of September, 1865; when the Court was composed of the Honourable the Chief Justice *Duval*, and of *Aylwin*, *Meredith*, *Drummond*, and *Mondelet*, Justices, and the judgment of the Superior Court was again reversed, Justices *Meredith* and *Drummond*, *dissentientibus*. It is necessary to notice that upon the return of the record to the Court below, the Respondent obtained permission to file another plea of perpetual exception in lieu of that originally pleaded, and the parties having again proceeded before the same Judge, the second judgment of the 15th of

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April, 1864, was rendered. The judgment of this Court, which was delivered on the 20th of September, 1865, reverses this last judgment, and contains a narrative of the proceedings which occurred after the amended plea of exception pleaded. It is to be observed that the second judgment is precisely the same as the first with reference to the question of *défense d'aliéner;* it is, therefore, unnecessary that anything further should be added to what has already been said. With reference to that portion of the second judgment of Judge *Taschereau* which relates to the rights asserted on the part of the Respondent with reference to *Judith Kenmer,* the wife of the Testator, it is only necessary to state that to enable the Respondent to claim the share of the Appellant it would be necessary that there should be a *partage,* or partition, of the whole of the property of *Tourangeau* and his wife, as the *communauté de biens,* to be divided between the heirs. But to do this it would be required that a new suit should be brought to effect the partition, hence the opposition would still be maintained instead of being rejected."

Mr. Justice *Berthelot,* who had been the Judge *Suppléant* on the case being determined on the Interlocutory decree on the 16th of March, 1863, but not on the final decree of the 20th of September, 1865, concurred with the majority of the Judges, and sent his reasons with the record, citing *Troplong,* "*Donations,*" No. 271; *Demolombe, Tom.* 18, Nos. 294, 308, 334; *Pandects,* vol. xii., p. 245; and referring generally to *Ricard* and *Pothier.*

Mr. Justice *Meredith,* who differed from the other Judges, and whose judgment was approved and adopted by the Judicial Committee, sent the following reasons for his judgment upon the question raised by the appeal:—"The principal question to be decided in this cause is, as to the effect to be given to a testamentary disposition made subject to a provision to the following effect:—*Avec défense d'engager, affecter, hypothéquer, vendre, échanger, ou autrement aliéner les dits biens immeubles qu'après vingt ans à compter du jour du décès du Testateur, sous peine de nullité de tous actes qu'ils feront contraires à la dite intention du Testateur.* Property held by the Appellant under the foregoing provision has been seized; an opposition founded on it was filed by the Appellant in the Court below; and it is from a judgment of the Superior Court dismissing

the opposition so filed that the present case comes before us. On the part of the Respondent it is contended that a *simple défense d'aliéner* does not create a substitution, and is not in any respect binding in law, and, therefore, that notwithstanding such a prohibition the donee or legatee may make a valid alienation of the property to which it refers. In support of this view the Respondent has referred to *Ricard*, who says:—'*Les Lois ont résolu par une décision générale, que lorsque la prohibition est pure et simple et sans cause qu'elle ne produit aucun effet, et que non-seulement les héritiers ab intestat du Testateur, ni de celui à qui les défenses ont été faites, n'ont droit de prétendre aucun fidei-commis en leur faveur, mais aussi que l'institué ou le légataire ne laisse pas, nonobstant la prohibition, d'avoir la liberté d'aliéner.*' (1) The opinion of *Henrys* on this subject is to the same effect, his words are as follows:—'*Donc, s'il y a quelque distinction à faire c'est entre la prohibition d'aliéner pure et simple et la prohibition d'aliéner faite en faveur de quelqu'un. La première n'opère rien et le Testateur n'ayant pas passé plus avant, elle ne passe que pour un simple conseil; mais au contraire si le Testateur, en prohibant à ses héritiers et successeurs d'aliéner les biens qu'il leur a délaissés, déclare que c'est afin qu'ils soient conservés à ceux qu'il désigne: par exemple à ses descendants, ou à ceux de sa famille, en ce cas la prohibition d'aliéner emporte un fidei-commis et c'est la même chose que si les descendants ou ceux de sa famille avaient été substitués à l'héritier; il faut donc que la prohibition soit faite en faveur de quelqu'un, pour empêcher que l'héritier ne puisse pas vendre. C'est la disposition du droit en la loi* 38 § 4, *et de la loi* 93 *ff. De légat* 3, *mais plus expresse en la loi filius familias* 114, § *Divi* 14 *ff. De légat* 1, *où le jurisconsulte dit que les Empereurs avaient décidé qu'il ne suffisait pas de prohiber l'aliénation, mais qu'il fallait encore exprimer la cause et déclarer la personne en faveur de laquelle on recherchait cette précaution; qu'autrement* nisi inveniatur persona cujus respectu hoc à testatore dispositum sit, nullius esse momenti scripturam quasi nudum præceptum reliquerit.' (2) Pothier also says:—'*La simple défense d'aliéner, lorsque le Testateur n'a pas témoigné en faveur de qui il*

(1) 2 *Ricard, des Donations*, p. 322, *Traité des Substitutions, tit.* III., ch. 7, *Partie* 1, No. 329.

(2) 3 *Henrys*, p. 219, liv. 5, ch. 4, quest. 49, p. 2.

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faisait cette défense, ne passe, à la vérité, que pour un simple avis nudum præceptum, *auquel celui à qui la défense est faite peut impunément ne pas déférer.*' (1) According to the foregoing authorities a *défense d'aliéner* is to be considered "*pur et simple*" unless it be stipulated in the interest either of the party making the donation or legacy or of some third person; and a *défense d'aliéner pur et simple* as above defined is to be deemed merely advice on the part of the person making the prohibition, and not binding upon the person to whom it is addressed. The reason upon which, as I believe, the above rules are founded being, that in the case of a *défense d'aliéner pur et simple* there is no person interested except the donee or legatee, and that a provision which cannot be enforced except at the will and by the party intended to be bound by it cannot in law be held legal and binding. The Appellant's Counsel have drawn our attention to the opinions of *Troplong* and *Demolombe* as shewing that a *défense d'aliéner* when made the condition of a legacy may in certain cases be unobjectionable, and in such cases ought to be enforced by the Courts. *Troplong*, in the passage cited in the *factum* of the Appellant, says: '*Que dirons-nous de la clause portant défense d'aliéner par vente, échange ou engagement pendant un certain temps? Les opinions sont partagées, mais je ne vois rien qui vicie cette condition qui souvent est imposée par le Testateur pour des bonnes raisons de prévoyance, de convenance, d'économie domestique. Le donateur en donnant un immeuble à une personne de sa famille, peut cependant éprouver le regret de le voir de son vivant sortir des mains de celui qu'il considère comme un autre lui-même, il lui impose alors l'obligation de ne*

(1) 5 *Pothier, des Substitutions*, p. 518. See also 6 *Toullier*, p. 521, No. 488. 6 *Nouveau Denisart*, p. 74. See also the case of *Fafard* v. *Bélanger*, 4 Low. Can. Rep., p. 215, and more particularly the remarks of Mr. Justice *Caron* in that case: "*Je considère cette défense d'aliéner obligatoire parcequ'elle comporte la condition de transmettre ses biens aux héritiers du côté et ligne, il en serait autrement si la defense était pur et simple.*" 2 *Bourjon*, p. 164, Tit. 5, ch. 5, sec. 7, Nos. 53, 54. 1 *Despeisses*, p. 19, part 1, tit. 1, sec. 2. (10) *Tertio. Dictionnaire des Arrêts* (*Brillon*), p. 126, *Verbo* "*Aliénation*," Nos. 25 et 37. 2 *Despeisses*, p. 138, part 1, *tit.* 2, "*des Substitutions*," sec. 6, art. 2, No. 32. *Rousseau de Lacombe* (Ed. 1769), p. 674, *Verbo* "*Substitution*," sec. 1. Dist. 2, No. 5. *Merlin* Rep. (Ed. 1828), pp. 152, 153, *Verbo* "*Substitution*," Fid. sec. 8, No. 5. *Poujol, Traité des Don.* (Ed. 1836) p. 90.

pas aliéner de son vivant. Dans d'autres circonstances le Testateur peut craindre que le légataire ne soit trop pressé de jouir et qu'il n'abuse du droit de propriété dont il le gratifie ; pour l'accoutumer à être propriétaire, pour l'affectionner à sa propriété, il lui impose la condition de la garder pendant cinq ans. Ne sont-ce pas là des mesures sages et prudentes? Pourquoi les repousser avec une sévérité sans règle? La prohibition d'aliéner n'est censée contraire à la liberté qu'autant qu'elle est absolue ; c'est alors qu'elle est considérée comme non écrite' (1). And *Demolombe* expresses his opinion as to this point in nearly the same words. In considering the above observations of *Troplong*, and the opinion of *Demolombe* to the same effect, it is necessary to bear in mind that a very wide difference exists between the law of *France* and our own law as to the subject under consideration. The Art. 896 of the Code Civil declares : '*Les substitutions sont prohibées. Toute disposition par laquelle le donataire, l'héritier institué, ou le légataire, sera chargé de conserver et de rendre à un tiers sera nulle même à l'égard du donataire, de l'héritier institué, ou du légataire*' (2). These provisions being altogether at variance with our own law on the subject, it is plain that the observations of *Troplong* and *Demolombe* must be read by us with great caution, and bearing this in mind, it appears to me that all that *Troplong* and *Demolombe* are to be understood as saying in the passages relied on by the Appellant is simply—that a prohibition to alienate in a donation or Will, if made for a short time and from reasonable motives, is not absolutely null, even under the provisions of the *Code Civil*. Those learned writers shew that such a provision can be enforced if made in the interest of the donee or legatee, or of a third party, and that if accompanied by a penal clause the penalty may be enforced in the event of a violation of the prohibition to alienate. But I am not aware that there is anything in the writings either of *Troplong* or of *Demolombe* tending to establish that a prohibition to alienate when made exclusively in the interest of the donee or legatee can be enforced by the donee or legatee, against his own acts and to the prejudice of his own Creditors. In the present case the Appellant relies on a *défense d'aliéner* in which, in so far

(1) 1 *Troplong*, "*Donations et Testaments*," No. 271. 1 *Grenier*, "*Donations*," p. 188.

(2) *Demolombe*, vol. xviii., p. 328, No. 303.

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as regards the property in question no person but himself is interested, and the object of his opposition is to prevent the sale of the property in question for the satisfaction of a judgment rendered against himself to enforce the payment of a debt which it may be observed, to the extent of above £1,100, appears to have been contracted after the death of the Testator whose Will contains the *prohibition d'aliéner* relied on by the Appellant. There is not, I repeat, so far as I know, anything in the works of *Troplong* or of *Demolombe* to justify the pretensions of the Opposant. On the contrary, *Demolombe* says: '*Il nous paraitrait impossible d'admettre le donataire ou le légataire qui aurait consenti l'aliénation à se prévaloir ensuite contre les tiers auxquels il aurait concédé des droits, de la défense d'aliéner qui aurait été imposée et qu'il aurait lui même enfreinte; car il ne se peut pas qu'il évince ceux-là même auxquels il doit garantie.*' *Troplong* also, in his *Traité du Contrat de Mariage*, No. 3060 and *seq.*, maintains the same doctrine. The foregoing observations, I think, suffice to prove that the opinions of *Troplong* and *Demolombe* are not in reality opposed to the authorities from our own law upon which the judgment of the Superior Court is based; but in order to remove any doubt as to the point I shall cite one further passage from the works of each of those authors. Troplong puts the question: '*La prohibition d'aliéner forme-t-elle une substitution?*' and he then continues: '*Il faut répondre négativement à cette question: car cette prohibition ajoutée à une substitution est nulle en loi et ne forme qu'un précepte, un* nudum præceptum *qui ne lie point, qui ne donne d'action à personne et dont on peut dire avec Papinien qu'il a été donné* obtentu consilii (1). And *Demolombe* says: '*On parait avoir de tout temps reconnu que la défense ou prohibition d'aliéner ne constitue qu'un simple précepte non obligatoire* nudum præceptum *lorsqu'elle est pure et simple, c'est à dire, lorsqu'elle n'est pas faite en faveur d'une personne qui est appelée à en profiter* nisi inveniatur persona cujus respectu hoc a testatore dispositum est.' L. 114, S. 14, *A. de Leg. Trevenot*, Nos. 129, 130. *Coin-Delisle*, Art. 896, No. 32 (2). It has, however, been said, and will, I believe, be maintained, that the authorities relied on by the Respondent have no bearing upon the present case, because they relate to

(1) *Troplong*, "*Donations et Testaments*," No. 135, p. 198.

(2) *Demolombe*, vol. xviii., No. 147, p. 172.

prohibitions to alienate in connection with the doctrine of substitutions, and not it is said to prohibitions to alienate unconnected with a substitution such as the case before us presents. The answer, I believe, to this objection is, that the two subjects are so closely connected as to make it impossible to treat of them separately. A *défense d'aliéner*, if made in favour of a third person, is (as has already been observed) in effect a substitution, and is, therefore, in law, obligatory. Whereas, if the *défense d'aliéner* is not made in favour of a third person it is not a substitution. In one very important point of view, therefore, in order to ascertain whether a *défense d'aliéner* is or is not valid it is necessary to inquire whether it does or does not amount to a substitution. This probably is one of the reasons which have caused the two subjects to be considered together by the most eminent French Jurists, who, I may observe, were not likely to treat as closely connected questions really independent of each other. There is another view which may be taken of this case, and which was strongly pressed upon our consideration by the learned Counsel for the Respondent. The Testator, in the Will under consideration, without assigning any cause or reason for the *défense d'aliéner* which it contains, has extended it to all his legatees and over the whole of his property, for a period of twenty years; and it has been contended by the learned Counsel for the Respondent, and, I think, with reason, that if such a clause is good for a period of twenty years, there are no grounds for saying that it could not be legally good for forty years, or for the lifetime of the legatee. Now, the policy of our law is, and ought to be, that property over which a man has full control should be subject to the payment of his just debts, whereas the effect of the provision in question, if it be valid, is to enable legatees to hold property over which they have in reality unlimited control free from the payment of their debts, and this irrespective of the nature of the debt sought to be enforced, or of the extent of the property held subject to such condition. It has, therefore, been further contended by the Respondent that the provision of the Will upon which the Appellant rests his claim ought to be held null on the ground of public policy. It may, however, be answered that a Testator may, by an express provision to that effect, bequeath property so as to be free

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from seizure for the debts of the legatee (1), and that property left expressly *pour ailments* (as the Authors say) is not liable to be brought to sale for the debts of the legatee (2). But admitting, for the sake of argument, and subject probably to certain limitations, that the law sanctions the two descriptions of bequests just mentioned when expressly made, still it is not the less true that bequests tending to prevent the alienation of property, and to enable the party holding it either to pay his debts or not, just as it may please him, are not entitled to favourable consideration; and I think that in giving effect to such clauses we ought not to go beyond the limits established by the authorities, or to add by reasoning from analogy to the number of exceptional cases which, on special grounds, are already sanctioned by law; and this I think we practically should do were we to give effect to the testamentary provisions relied on by the Appellant. But, although I think the point just adverted to ought not to be passed wholly unnoticed, I wish it to be understood that the ground upon which I would deem it my duty to confirm the judgment of the Court below is, that in my opinion it is a well-established rule of law that a *défense d'aliéner pur et simple*, such as that contained in the Will before us, is inoperative. This rule which, having its foundation in the Roman law, appears to have been acted upon for centuries in *France* (3), has been transmitted to us as law by Jurists such as *Ricard*, *Henrys*, and *Pothier*, and is not controverted, so far as I know, by any writer upon the ancient or modern law of *France*. I, therefore, think that the learned Judge of the Superior Court was justified in taking that rule as his guide, and that his judgment, which purports to be founded upon it, and is in all respects in accordance with it, ought to be confirmed."

For his reasons in the second appeal Mr. Justice *Meredith* referred to the opinions expressed by the Chief Justice and himself, as reported in the Low. Can. Rep. vol. xiii. pp. 278—350.

From the final judgment of the Court of Queen's Bench, and the

(1) 7 *Pothier*, *Proc. Civ.*, p. 197; 1 *Vigeau*, p. 612.

(2) 3 *Ancien Denisart*, *verbo Saisie*, *arrêt*, 23, No. 6, *sec. partie*, p. 9. See also judgment of the Superior Court at *Montreal*, *Boyer* v. *Dillon* and *Watson*, about 1853-54.

(3) Vide *Arrêt du Parlement de Paris*, *du mois de Sept.* 1584.

former Interlocutory judgment of the 10th of March, 1863, the present appeal was brought. As the Respondent did not appear, the appeal was heard *ex parte*.

Sir *R. Palmer*, Q.C. (with whom was Mr. *H. M. Bompas*), for the Appellant:—

The question turns upon the construction of the clause in the Will of the Testator, the Respondent's Father, restricting alienation or incumbrance, for a period of twenty years, of real estate bequeathed absolutely to the Respondent. Such restriction, if valid, goes to defeat the just claims of Creditors, and leaves the Respondent in the full enjoyment of the property; a result not to be found in any Code of law. Now, we contend that this clause of the Will is null and void in law, as against public policy. Mr. Justice *Meredith*, whose judgment we rely on, and desire to avail ourselves of as part of our argument, controverts the authorities cited by Justices *Aylwin* and *Berthelot*, and shews that the passages cited from *Demolombe* and *Troplong* do not bear out the conclusion sought to be drawn from them. This is apparent from the provisions of the Civil Law, on which the old law of *France* is founded: *Dig.* B. xxx. *lib.* 1, Art. 114, § 14; B. xxxii. *lib.* 1, Art. 38, § 4. It is to be observed that both *Troplong* and *Demolombe* are writing upon the law as it at present exists, namely, the *Code Civil*, and expounding the old *French* law, which is applicable to our case only so far as it illustrates or defines the present law: *Troplong, Droit Civil, Explique contrat de Mariage, Tom.* IV. p. 63, No. 3060. It is almost needless to illustrate the case by a comparison with the law of this Country. It is no answer to say that the Testator might have provided against alienation by giving the estate over on breach of the condition; here he gives his immoveable property absolutely; the condition is subsequent and not precedent, and there is no gift over in case of breach of the condition. By the law of *England* such a restriction, depending on a condition subsequent, would, even if there was a gift over, be invalid: *Holmes* v. *Godson* (1); *Saunders* v. *Vautier* (2); *Doe dem. Mitchinson* v. *Carter* (3); *Ex parte*

(1) 8 D. M. & G. 152. (2) Cr. & Ph. 241.
(3) 8 Term Rep. 57 & 300.

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Dickson's Trusts (1); *Egerton* v. *Earl Brownlow* (2); but even if the clause in the Testator's Will restricting alienation or incumbrance were valid, it could only affect one half of the lands seized, and the opposition ought to have been dismissed as to the residue of the lands. Even if the prohibition against alienation or incumbrance in the Will were valid, it is only against the alienation by act of the devisee himself, and cannot operate against the right of the Appellant, an execution Creditor, coming in by operation of law, and not by the act of the devisee.

LORD ROMILLY :—

Their Lordships are of opinion, that it is not necessary to trouble Mr. *Bompas*, having heard Sir *Roundell Palmer* very fully, as we are all quite clear as to the principles and law to be applied to this case. We are of opinion, that such a restriction as was made by the Testator, *M. Tourangeau*, in his Will, was not valid either by the old law of *France*, or the general principles of jurisprudence. We may add, that we entirely concur in the reasons stated in the very able judgment of Mr. Justice *Meredith*, which have been forwarded with the record. Their Lordships will, therefore, advise Her Majesty that the judgment of the Court of Queen's Bench in this case be reversed, and with costs.

Solicitors for the Appellant: *Bischoff, Coxe, & Bompas.*

(1) 1 Sim. (N.S.) 37. (2) 4 H. L. Cases, 1.

WILLIAM CARTWRIGHT . . . . . APPELLANT;

AND

RICHARD PHILPOTT AND WILLIAM STANSFIELD BROADBENT . . . . . } RESPONDENTS.

J. C.*
1867-8
June 22;
Feb. 6.

THE "JEFF. DAVIS."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Jurisdiction—Mortgage of Ship—Decree for unlivery of Cargo and sale.

Order made by the Judicial Committee, on application of the Respondents in a pending appeal, for unlivery of the cargo and sale of a mortgaged Ship, the unlivery and sale of which had been decreed by the Court of Admiralty. Such decree afterwards affirmed.

THIS was an appeal from a decree of the High Court of Admiralty, made in a cause of mortgage, instituted on behalf of the Respondents against the vessel *Jeff. Davis*, her tackle, &c., and against the Appellant, the owner of the vessel.

It appeared from the pleadings, that the *Jeff. Davis* was a barque of about 237 tons, of which the Respondents were the registered Mortgagees, by virtue of a Mortgage made by the Appellant, for securing the repayment of the sum of £1500, with interest at 5 per cent. per annum, in manner therein mentioned.

The Mortgage was in the form prescribed by the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, sec. 66, Schedule, "Form of Mortgage," No. I., and provided for the payment of the principal sum by four instalments of £375 each, payable respectively at four, eight, twelve, and sixteen months. Default was made in payment of these instalments, whereupon the vessel was arrested at the instance of the Respondents, who instituted a suit in the Court of Admiralty on the Mortgage Bond, and prayed a sale of the vessel.

The Appellant, by his answer, set forth an agreement entered into with the Respondent shortly before the date of the Mortgage, for the purchase by him of the *Jeff. Davis*, to be paid for by four separate acceptances or instalments, the sellers to hold a Mortgage

* *Present:*—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR RICHARD TORIN KINDERSLEY.

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on the Ship for the full payment thereof, with interest, and that, as a collateral security, the Respondents further agreed to accept six Bonds of the *St. Ives Railway Company*, of the value of £250 each; that in pursuance of such agreement the vessel was duly transferred to the Appellant, who subsequently executed the Mortgage, and accepted four Bills of Exchange for £375 each; that the Appellant, while in possession of the vessel, chartered her to proceed to *Monte Video*, and other ports, and for a voyage home; that the freights payable under such charter-parties amounted to upwards of £1700. The Appellant further alleged that the Respondents, before any of the instalments or acceptances had become due, had wrongfully sold and converted into money the six Railway Bonds, or some of them, and appropriated to their own use the proceeds of such sale, to an amount more than sufficient to meet the first of such instalments or acceptances; that they had subsequently, and although no principal or interest was in fact due to them, wrongfully entered into possession of the vessel while in prosecution of her voyage to *Monte Video*, and discharged her Master, who, in consequence thereof, had instituted a suit against the vessel for the recovery of his wages and disbursements, and caused the vessel to be arrested, that the Respondents, though no principal money or interest was due on their Mortgage, had wrongfully instituted the Mortgage suit whilst the Ship was under arrest at the suit of the Master; and the Appellant insisted that but for the wrongful conduct of the Respondents in taking possession of the Ship, and discharging the Master, she would have performed her intended voyages, and have earned the freight payable under her respective charter-parties, which she was thereby prevented doing.

The Respondents, in their reply, admitted the sale and mortgage of the vessel, but denied that they had sold or converted any of the six Railway Bonds, which they still held, and were ready to deliver up on the termination of the suit, as the Court might direct; they further stated that the acceptance mentioned in the answer, which first became due, was dishonoured before the institution of the suit, and that the amount thereof had never been paid.

Upon the hearing of the cause, the Judge of the Admiralty Court (the Right Hon. Dr. *Lushington*), pronounced the usual decree, declaring, in the terms of the prayer of the petition, for

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the Mortgage, and that the sum of £1500, together with interest thereon, as specified in the Mortgage Bond, was due to the Respondents, and condemned the *Jeff. Davis* in such amount with interest and costs, decreeing the vessel, together with her appurtenances, to be appraised and sold; reserving all questions as to the priority of the various Claimants to payment out of the proceeds. By a subsequent Order the Judge decreed the cargo to be unlivered.

The Appellant interposed an appeal, and procured the usual Inhibition, Citation, and Monition, to be issued and served, whereby the sale of the vessel and unlivery of the cargo was stayed.

In consequence the Respondents presented a petition, and applied by Motion to the Judicial Committee for an Order that a Commission for unlivery should issue, the cargo be discharged, the Ship sold, and that the Appellant should give security for the costs of the appeal. The petition stated the facts and proceedings already set forth; that the Railway Bonds lodged with the Respondents as collateral securities, alleged by the Appellant to have been converted by them, were still in their custody and possession, never having been in any way dealt with; and which they were ready to deliver up to the Registrar to abide the result of the appeal: and they stated that unless such order of unlivery and sale, as prayed for, was made by the Judicial Committee, the keeping the vessel unsold in the hands of the Marshal of the Admiralty Court would materially diminish the value of the vessel to them as a security for the money advanced to the Appellant.

The petition was supported by affidavits of the Respondents.

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Mr. *Cohen* moved their Lordships, on behalf of the Respondents, for an Order that a Commission for unlivery should issue, or that the cargo on board should be discharged, and the Ship sold, and that the Appellant should give security for costs.

Mr. *Joyce*, for the Appellant, opposed the application.

THE LORD JUSTICE TURNER:—

This is an application on the part of the Respondents for the sale of the ship, the *Jeff. Davis*, which was mortgaged to them,

* *Present*:—THE LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, SIR RICHARD TORIN KINDERSLEY, and SIR LAWRENCE PEEL.

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and which has been decreed in the Court of Admiralty to be sold, and the sale of which is only stopped by the Inhibition consequent upon the Appellant having appealed from the decree of the Court of Admiralty.

Their Lordships are rather surprised at an opposition being made to this motion, because it is evident that the primary interest of both parties would be that the Ship should be sold, provided it be sold without prejudice to the rights of the parties, because otherwise the Ship, of course, is daily incurring expense which must fall upon one or other of the parties according as the result of the litigation between them may terminate.

Now, in order to satisfy us that this Ship ought not to be sold, it seems to their Lordships that the Appellant ought to prove satisfactorily, on his part, that the Mortgagees improperly took possession of the Ship, so that he was entitled at the hearing of this appeal to charge them with the £1700, the freight which might have been earned if they had not taken possession—that he could charge them with that £1700 and so discharge the Mortgage and entitle him to have the Ship in specie. Well, one answer to that is—that a Ship in specie is not altogether like land, and there is no specific difference of value between one Ship and another, and that the same money which would be the purchase-money of this Ship would buy another Ship; and that, therefore, there is no particular interest in this Ship which could give the Appellant the right to have that particular chattel restored to him.

Without leaning too much on that objection, the question is, whether the Appellant has or has not satisfied us that that was the case, and that he was entitled to have the Ship back again by reason of the Respondents having so dealt with her as to render themselves liable for the £1700, the amount of the freight which would have been earned by her?

Now, beyond all question—it is admitted on all sides—the Appellant made default in payment of the first Bill, and thereupon there accrued to the Respondents the right to sell the Ship. Well then, an answer is attempted to be given to that right on the part of the Respondents. It is said that the Respondents had other security—certain Bonds of the *St. Ives Railway Company* which were given also as a security for the same Bills of Exchange

for which the Mortgage was given; but there is nothing said upon the face of the Mortgage, or upon the agreement for the Mortgage, which would make the Mortgage a collateral security and place the Bonds as the primary security. True, as between the Bills of Exchange and Mortgage, the Mortgage is a collateral security for the Bills of Exchange; but as between the Mortgage and the Bonds the Mortgage would seem to be principal and not collateral security; and, therefore, the mere fact of the Respondents not having availed themselves of those Bonds would not at all destroy the principal security which they had by virtue of the Mortgage.

But it is said that the Respondents did avail themselves of those Bonds. The evidence upon that subject is perfectly decisive—that they did not; for in the affidavit of the Respondents they say that the Bonds have never been sold by them, nor have they ever been out of their possession, or ever converted by them in any way whatever; to which the only answer that is given on the part of the Appellant is, that the Respondents have appropriated the Bonds to their own use, and do retain them contrary to the terms of the agreement set forth in the answer—that is to say, the Respondents do exactly what they are authorized to do, viz.,—retain the Bonds as a security for the amount, the £1500, which is secured by the Bills of Exchange.

Their Lordships are, therefore, of opinion that there is no proof whatever that there has been any appropriation of the Bonds to the payment of the debt which was due upon the first Bill of Exchange. Under these circumstances, it appears to their Lordships quite clear that the proper Order to be made here will be to order the unlivery and sale of the Ship without prejudice to any question: the proceeds to be brought into Court, and that the Respondents should also deposit the *St. Ives Railway Company's* Bonds, and the other securities which they have, all of them to be dealt with by the Court upon the hearing of the appeal.

In pursuance of this Order the *Jeff. Davis* was sold, and produced the sum of £910.

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The appeal now came on for hearing.

The Appellant in person

Contended, that the Ship having been chartered by him for the

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amount of £1700, and the Respondents having seized and taken possession of her upon her outward voyage, by such seizure they took upon themselves all the responsibilities of sailing owners by direct undertaking to the Charterers. That they were thereby enabled to repay themselves the entire amount of the Mortgage debt and interest, if they had carried out the charterparty as they were bound to do; and that as the ship had been sold by direction of this Court, the proceeds of the sale, together with the six Bonds of the *St. Ives Railway Company* and other securities now in Court, ought to be paid over to him.

Their Lordships without calling on the Respondents' Counsel, Mr. *Cohen*, dismissed the appeal, observing that the claim for the proceeds of the sale of the vessel on account of the assumed loss and value of freight, which was said to have been occasioned by the seizure of the vessel by the Respondents under their Mortgage security, was not before the Court, and could not be entertained on an appeal against the Mortgage decree; such claim, if capable of being made and sustained, being matter for a separate and distinct proceeding. The costs of the appeal were ordered to be paid out of the proceeds of the sale.

Solicitor for the Appellant: *J. J. Peddell.*
Solicitors for the Respondents: *Neal & Philpot.*

WILLIAM INMAN . . . . . APPELLANT; J. C.*

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THE "CITY OF ANTWERP" AND THE "FRIEDRICH."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision between Steamer and Sailing-vessel — Sailing Regulations—Duty of Steamer—Cross suits—Both vessels held to blame—Appeal by one party only —Res Judicata.

It is a rule in cases of collision between a Steamer and a sailing ship, that although the latter may have been guilty of misconduct, or may not have observed the general steering and sailing Regulations, yet the Steamer will be held culpable, if it appears it was in her power to have avoided the collision.

Where a Steamer is charged with having omitted to do something which ought to have been done, proof of three things is required:—first, that it was clearly in the power of the Steamer to have done the thing charged to have been omitted; secondly, that if done it would in all probability have prevented the collision; and thirdly, that it was such an act as would have occurred to any Officer of competent skill and experience in command of the Steamer.

In cross suits between a sailing-vessel and a Steamer, the Court of Admiralty held both vessels to blame, and decreed the damages sustained to be equally divided between them. Such decree reversed on appeal, as the case of the sailing vessel setting forth the alleged negligence on the part of the Steamer had not been proved.

The Steamer alone appealed in both suits. *Held*, further, that as the sailing-vessel had not appealed from the decree which declared she was in the wrong, such decree operated as *res judicata* that the allegations made in her suit were not substantiated.

THESE appeals were brought by the Appellant, the owner of the Steamship the *City of Antwerp*, from a decree of the High Court of Admiralty, pronounced first, in a cause of damage there instituted by the Respondents, the owners of the vessel the *Friedrich*, a *Bremen* ship, against the Steamship *City of Antwerp*, and the Appellant her owner, intervening, to recover damages for the loss of the *Friedrich* and her cargo, occasioned by a collision

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR RICHARD TORIN KINDERSLEY.

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with the *City of Antwerp* in the *Irish Channel;* and, secondly, in a cross suit instituted by the Appellant against the Respondents, the owners of the *Friedrich*, to recover damages the *City of Antwerp* had sustained by such collision.

The *Friedrich* was a vessel of 937 tons register, and the *City of Antwerp* a screw Steamship of 1625 tons register. The collision took place on the 28th of March, 1867, in the *Irish Channel.*

In the petition by the owners of the *Friedrich* the Respondents stated as follows:—That the night was a fine, clear moonlight. There was a fresh breeze from about W.N.W. The *Friedrich* had her coloured regulation lights duly exhibited and screened, and the same were burning brightly, and it was alleged that a good and careful look-out was being kept on board her. That under such circumstances, a sail was reported ahead of the *Friedrich*, which was ascertained to be a small schooner on the same course as the *Friedrich*, at a considerable distance, and about half a point on her port bow. The *Friedrich* thereupon continued her course till she neared the schooner, and then ported about one point, so as to pass her with safety about half a cable's length to leeward of her. Before the *Friedrich* had passed the schooner, the look-out of the *Friedrich* reported a light ahead, which proved to be the masthead light of the Steamship the *City of Antwerp;* that the port light of the Steamship was at the same time visible about a point at the port bow of the *Friedrich*, and apparently at a considerable distance. After clearing the schooner the *Friedrich* was brought to her proper channel course, N.E.; the *City of Antwerp* being at such time about a point and a half on the lee bow of the *Friedrich*, distant between a quarter and half a mile, having meanwhile shut out her port light and opened her starboard light, as if intending to pass to leeward of both the schooner and the *Friedrich.* The latter was accordingly luffed up about half a point: but almost immediately afterwards the Steamship altered her course, and, shutting in her starboard light, again shewed her port light on the starboard bow of the *Friedrich*, causing immediate danger of collision; whereupon the helm of the *Friedrich* was put hard down, in order to bring her sails aback, so as to lessen the mischief if possible; notwithstanding which the Steamship ran at full speed across the bows of the *Friedrich*, catch-

ing that ship's jibboom with her port main rigging, and sluing her head round; then with her port side catching the stem of the *Friedrich*, tore it open from the wood ends of her starboard bow, causing a dreadful leak, in consequence of which the *Friedrich*, in spite of every effort that could be made to save her, foundered in about three hours, with everything on board her. That the collision was occasioned solely by the default and mismanagement of those on board the *City of Antwerp* in not taking proper steps to keep clear of the *Friedrich*, as she was bound to do; and that no blame in regard to the collision was imputable to those on board the *Friedrich*.

The Appellant, the owner of the *City of Antwerp*, by his answer, alleged that the night was fine, with a fresh breeze from W. by N., and the Steamer was making about eleven knots an hour. Her regulation lights were properly fixed and burning brightly, and a good look-out was being kept on board, that the *Friedrich* was seen ahead, and slightly on the port bow, distant about a mile and a half. No lights of the *Friedrich* were then visible. The *Friedrich* was carefully observed, and was shortly made out to be a vessel on an opposite course to that of the Steamer, and with the wind free. The helm of the *City of Antwerp* was thereupon put a-port, and then hard a-port. That had the *Friedrich* kept her course, as she was bound to do, the two vessels would have passed port side to port side, a very considerable distance apart; but the *Friedrich* put her helm hard a-starboard, and coming rapidly round under her starboard helm, ran stem-on at great speed into the *City of Antwerp's* port main-rigging, doing much damage. As the two vessels approached each other, the *Friedrich's* starboard light—a dim green light—was seen. At the time of the collision the *City of Antwerp* had paid off between five and six points under her port helm, and the *Friedrich* must have come round about the same number of points under her starboard helm. At the time when those on board the *City of Antwerp* first sighted the *Friedrich*, the vessels were on opposite courses, and each had the other on her port hand. From the time when the *Friedrich* was first seen until the collision, the *City of Antwerp* always had the *Friedrich* on her port hand. That the *Friedrich* improperly starboarded her helm when there was otherwise no danger of collision. That

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the lights of the *Friedrich* were dim, and were improperly placed in her mizen-rigging; and that the collision was caused by the negligence and improper conduct of those on board the *Friedrich*, and that no blame was attributable to the *City of Antwerp*.

The Plaintiffs traversed the answer, and the pleadings were concluded.

A cross suit was instituted by the Appellant, the owner of the Steamship the *City of Antwerp*, against the *Friedrich*. The petition alleged the same facts as before stated in the answer to the petition in the suit brought by the owners of the *Friedrich* and cargo against the *City of Antwerp*, and alleged that the collision was caused by the negligence and improper conduct of those on board the *Friedrich*, and that no blame was attributable to the *City of Antwerp* or those on board her. The answer of the *Friedrich* made the same case as originally relied on by the owners in their petition, and charged that the collision was occasioned solely by the default and mismanagement of those on board the *City of Antwerp*, in not taking the proper steps to keep clear of the *Friedrich*, as she was bound to do, and that no blame with regard to the collision was imputable to those on board the *Friedrich*.

The suits were heard together on the same evidence, before the Judge of the Admiralty Court (The Right Hon. Dr. *Lushington*), assisted by two of the Elder Brethren of the *Trinity House*. The effect of the evidence, which was conflicting, sufficiently appears in their Lordships' judgment.

The learned Judge held both parties equally to blame, and pronounced that the collision in question was occasioned by the fault or default of the Master and crew of the *Friedrich*, and by the fault or default of the Master and crew of the Steamship *City of Antwerp*; that the damage arising therefrom ought to be borne equally by the owners of the vessel *Friedrich* and by the owners of the *City of Antwerp*, and for a moiety of the damage proceeded for.

The owner of the *City of Antwerp* alone appealed in both suits from this decree.

The appeals were heard together and were argued by

The *Solicitor-General* (Mr. *Brett*, Q.C.), Mr. *Milward*, Q.C., and Mr. *Butt*, for the *City of Antwerp*, and by

The *Attorney-General* (Sir *John Karslake*, Q.C.), and the Queen's Advocate (Sir *Travers Twiss*, Q.C.), for the *Friedrich*.

The arguments principally turned on the fact, upon which the evidence was conflicting, as to the time of porting or starboarding the Ship and Steamer. On the part of the Appellant it was admitted that, under the steering and sailing regulations, the duty of the *Friedrich* was to keep her course, but it was submitted that, on the evidence of the *Friedrich's* own witnesses, she had gone off five points under a starboard helm, and that the *City of Antwerp* having gone off five points under her port helm, it was manifest that she had taken ample measures to keep clear of the *Friedrich*, had not her manœuvres been counteracted by the improper starboarding of the *Friedrich's* helm; and further, that the finding of the Court below was wrong upon the evidence, as it was shewn that the *Friedrich* was solely to blame.

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Judgment having been reserved, was now pronounced by

LORD WESTBURY:—

This case comes before their Lordships in a peculiar form,—a collision having occurred in the *Irish Channel* between a *Bremen* sailing-ship of large tonnage and one of the *Liverpool* American Steamers, the result of which was the total loss of the Ship and her cargo, and some damage to the Steamer. Cross suits were instituted in the Court of Admiralty by the owners of the Steamer and by the owners of the sailing-vessel, which came on to be heard before the Judge of the Admiralty Court, assisted by two of the Elder Brethren of the *Trinity House*, who gave judgment that both vessels were to blame, and that the damages sustained ought to be equally divided between them. The result is, that the owners of the Steamer will have to pay a very considerable sum of money, amounting probably to £20,000, as one moiety of the value of the *Friedrich* and her cargo. The sentence, therefore, is, in effect, a severe judgment against the owners of the Steamship. The case made on behalf of the *Friedrich* in her petition is distinctly stated, and if it had been believed by the Court below, it would have been impossible to hold that the *Friedrich* was to blame; but as it was rejected by the Court below, and the

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Friedrich has not appealed from the decision declaring that she was in the wrong, it is *res judicata* that the case made by her petition is not substantiated, and that her allegations are not entitled to credit.

We begin, therefore, with this admitted fact, and we have only to inquire whether the Steamship is or is not to be held to have been in the wrong also. There is no statement in the petition of the *Friedrich* of any ground or reason why, supposing the *Friedrich* to have acted wrongly, the *City of Antwerp* ought to be held to have been in the wrong also; and, unfortunately, we are not told in the judgment upon what ground the Court, after having rejected the case of the *Friedrich*, held that the *City of Antwerp* ought to be condemned to pay this large sum of money.

It is undoubtedly true, in cases of collision between a sailing-ship and a Steamer, that, although the sailing-ship may be found to have been guilty of misconduct, or not to have observed the sailing regulations, yet the Steamer will be held culpable if it appears that it was in her power to have avoided the collision. It cannot be too much insisted on that it is the duty of a Steamer, where there is risk of collision, whatever may be the conduct of the sailing-vessel, to do everything in her power that can be done consistently with her own safety, in order to avoid collision. But, according to the settled rules for the administration of justice, the party against whom judgment is given is entitled to know from the complaint of his adversary what is the default or misconduct imputed to him, that he may have an opportunity of meeting the case by his defence, and also by his evidence. And it is difficult to suppose a greater case of hardship than that a Defendant, after having met and disproved the case made by the Plaintiff, should yet have judgment pronounced against him upon some ground of complaint which was neither pleaded by his adversary, nor stated in argument during the discussion of the cause, and not even disclosed in the judgment of the Court. But, inasmuch as this has been done, it is our duty to examine with great care the facts of the case, for the purpose of ascertaining whether the conclusion is just that the Steamer, if she had done something which it was plainly in her power to do, might have prevented the collision which occurred.

Taking the undisputed facts of the case, it appears that the

Friedrich, at about half-past two o'clock in the morning of the 28th of March last, was shaping her course to *Liverpool* up *St. George's Channel*, with her head to the N.E. There was a fresh breeze from the W.N.W., and the *Friedrich*, therefore, was running free. The weather was fine, and the night clear. About half-past two in the morning she first sighted the Steamer, which had left *Liverpool* and was on her way to *Queenstown*, her course being S.W. half W. The *Friedrich* was making about nine knots an hour, and the Steamer about eleven knots. Taking, therefore, the combined speed of the two vessels, they would pass over a nautical mile in three minutes. Between the *Friedrich* and the Steamer there was a schooner steering the same course as the *Friedrich*, and which, according to the evidence of the *Friedrich*, was, when she first sighted the Steamer, about 600 yards distant lying on the same course, but a little to windward. When the *Friedrich* first saw the lights of the Steamer she made out the white light and the red light; and it is the case of both vessels that, when first seen by each other, each vessel was about a point or a point and a half on the port side of the other. The *Friedrich*, being a better sailer, forereached the schooner, passing her on the (schooner's) starboard side, and for that purpose ported about one point. She then luffed up, so as to regain her former course, and laid her head again to the N.E. Her witnesses say that from the time she ported to run to leeward of the schooner and the time of luffing about eight minutes elapsed, and the *Friedrich* is then described as afterwards sailing on her original course for about a minute longer before she again observed the lights of the Steamer.

These circumstances are material as tending to shew two things:—First, that there was a very imperfect look-out on the part of the *Friedrich*. Second, that she had got very near the Steamer indeed before, as she alleges, she observed the green light of the Steamer. The evidence of the second mate of the *Friedrich* is, that he suddenly saw the green light of the Steamer, and that the latter vessel was then only a quarter of a mile distant from the *Friedrich*, on the starboard-bow. The Mate says that he then luffed, and put his vessel under a starboard-helm, until she rounded to about five points from her original course, and her head was brought N. by W. But it is clear, upon the evidence,

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that the Steamer never was on the starboard-bow of the *Friedrich,* and such must have been the opinion of the Court below, for otherwise it would have been impossible to hold that the *Friedrich* acted wrongly. With the exception of the fact of the position of the Steamer, there is an agreement between the witnesses on both sides as to the distance between the Steamer and the *Friedrich* at the time when the latter began to starboard her helm; for the Captain of the Steamer says that the *Friedrich* was distant about a quarter of a mile from the Steamer at the time when the *Friedrich* began to round to, under her starboard-helm. The material inquiry then arises whether, in this state of things, it being clear that the Steamer was on the port side of the Ship, anything was done by the Steamer that ought not to have been done, or whether anything was omitted to be done that ought to have been done, and which, if omitted or done, would have prevented the collision. It appears that the Steamer made out the *Friedrich* as soon as she passed the schooner, and that she ported her helm whilst the Ship was at least a mile distant, and afterwards, as the *Friedrich* approached nearer, put her helm hard a-port, and that the Steamer had, before the collision, gone off under her port-helm five points to the westward; but that the *Friedrich* rounding to very quickly, under her starboard-helm, brought her head within six points of the head of the Steamer. In this state of things, the Captain of the *Friedrich,* for the first time, came on deck from below, and his evidence is material. He tells us that, on his coming on deck, he found the bow of his vessel only half a ship's length from the Steamer, and that collision was inevitable; in fact, he states that the collision actually took place within four or five seconds after he came on deck. He describes the Steamer as lying, at the time when he came on deck, across the bow of the *Friedrich,* about half a length on one side and half a length on the other side of the bow, so that the stem of the *Friedrich* was pointing at the midships of the Steamer, and that the *Friedrich* was still luffing, but her sails had begun to shake in the wind. Now, this position of the two ships must have been produced either by the Steamer running down from the starboard side of the *Friedrich,* close under her bows, or by the *Friedrich* rounding to, under a starboard-helm, until she brought her stem within a few yards of the

Steamer's midships on the port side. We are of opinion that the latter was clearly the case, and that the Steamer, being on the port side of the *Friedrich*, could not have anticipated or avoided, more than she did, this unexpected, sudden, and erroneous proceeding on the part of the Ship. We are pressed by the Counsel of the *Friedrich* to hold that, when the Steamer first observed the *Friedrich* coming round under a starboard-helm, it was the duty of the Steamer, by stopping and reversing her engines, to have gone astern out of the way of the *Friedrich*, and that she did wrong in going ahead. But there is no witness who gives evidence to any such effect, and even if we were to conclude that the stopping, reversing, and getting sternway on so large a Steamer as the *Antwerp*, would not have occupied more than three minutes, yet it seems plain from the evidence, and particularly from the testimony of the Captain of the *Friedrich* himself, that such an attempt would not have prevented the collision. In fact, the act done by the Captain of the *Friedrich*, the instant he came on deck, confirms the conclusion that the best course for the *Antwerp* to pursue was to go ahead as rapidly as she could; for the course taken by the Captain was to put down his helm as hard as possible, in order to throw his sails aback, so that he might avoid striking the *Antwerp* a direct blow with the stem of his vessel, and might weaken the collision by striking her with his starboard-bow; and this he appears to have effected, for it is clear, upon the evidence, that the direction of the blow was from aft to forward on the side of the Steamer. It was impossible for the Captain of the Steamer, when he first observed that the *Friedrich* was luffing, to know or suppose that she would do anything so unnecessary and foolish as to round to five points under a starboard-helm. She might have luffed one or even two points without danger, and if she had then steadied and kept on her course she would have passed clear of the Steamer; but the evil arose from the *Friedrich* rounding to five points under a starboard-helm, very quickly, which, as she was so very near the Steamer, gave no time for any other course to be adopted than that which was adopted, and which the *Liverpool* Pilot on board, though not in charge of the Steamer, and who is a disinterested and competent witness, states was the only possible thing to be done.

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When a Steamer is condemned for having omitted to do something which she ought to have done, it seems just to require clear proof of three things,—first, that the thing omitted to be done was clearly within the power of the Steamer to do; secondly, that if done, it would, in all probability, have prevented collision; and, thirdly, that it was an act which would have occurred to any Officer of competent skill and experience in command of the Steamer. These conditions do not appear to their Lordships to be fulfilled by those who impute fault to the Steamer in this case, and, in fact, all the trustworthy evidence in the cause leads to a contrary conclusion. Our opinion, therefore, is, after the most careful examination of the case, that the collision was due to the want of a proper look-out on the part of the *Friedrich*, inasmuch as after passing the Schooner, the young man, who was the second Mate of the *Friedrich*, and was the Officer of the watch on board her, appears not to have observed the lights of the Steamer until he was not more than 500 yards distant from her, and that then, in the anxiety and confusion of the moment, he gave the order to starboard instead of keeping on his course, which, if he had done, would have avoided collision, inasmuch as the Steamer had, by keeping her helm hard a-port, gone off six points to the westward of the course she was pursuing at the time when she first sighted the sailing-vessel. At that time the course of the *Friedrich* was N.E., and the course of the Steamer, being on the port-bow of the *Friedrich*, was S.W. half W.; but at the time of the collision the steamer's head was lying W.N.W.

Their Lordships do not find it either stated or proved upon the pleadings or the evidence, that anything was done which ought not to have been done by the Steamer, or that anything was omitted to have been done by her which it was possible to do, and which, if done, would have prevented the collision. They cannot, therefore, concur with the conclusion of the Court below, and they will feel it their duty humbly to advise Her Majesty that the decree of the Court of Admiralty ought to be reversed.

Solicitors for the Appellant: *Gregory, Rowcliffes, & Co.*
Proctors for the Respondents: *Dyke & Stokes.*

THE QUEEN *v.* MURPHY.

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ON PETITION FROM THE SUPREME COURT OF NEW SOUTH WALES.

Felony—New trial—Leave to appeal.

2 PC 538

Special leave to appeal granted to the Attorney-General of *New South Wales* from an Order of the Supreme Court in that Colony, whereby a verdict of guilty for murder obtained by the Crown was set aside, and a new trial granted.

Proceedings in the Colony stayed pending the appeal.

THIS was a petition by the Attorney-General of the Colony of *New South Wales*, praying for special leave to appeal from an Order of the Supreme Court, whereby a verdict of guilty obtained for the Crown on a trial for murder was set aside and a *Venire de novo* for a new trial granted.

The facts as stated in the petition were these:—On the 12th of August, 1867, an Information was filed by the Petitioner, as such Attorney-General, in the Supreme Court of *New South Wales*, at the sittings of that Court holden at *Darlinghurst* in the Colony, as a Court of Oyer and Terminer and Gaol delivery, charging one *Michael Murphy* with having, on the 22nd of November, 1865, at *South Creek*, killed and murdered one *Samuel Hassen*. To this Information the Prisoner pleaded "Not guilty," and issue was joined thereon. The Prisoner was tried on the 19th, 20th, 21st, and 22nd days of August, 1867, upon the issue so joined upon the Information, before Mr. Justice *Cheeke* and a jury. Evidence for the Crown and for the Prisoner having been taken, the Counsel for the Crown and for the Prisoner respectively addressed the jury. The Judge charged the jury, who retired from the Court to consider their verdict, and having been kept without at any time separating for the space of twenty-seven hours and upwards, returned into Court and stated in open Court to the Judge, by their Foreman, that they had not agreed upon their verdict and were not likely to agree thereon, whereupon the

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, and SIR RICHARD TORIN KINDERSLEY.

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Judge discharged the jury from giving a verdict, and remanded the Prisoner to his former custody. At the sittings of the Court at *Darlinghurst* as a Court of Oyer and Terminer and Gaol delivery, on the 10th of September, 1867, the issue upon the Information came on again to be tried before Mr. Justice *Faucett*, and a jury, and was tried on the 10th, 11th, 12th, 13th, and 14th days of September, when the jury returned a verdict of guilty upon the issue so joined upon the Information, and the Court sentenced the Prisoner to death. On the 19th of September, 1867, the Supreme Court, sitting *in banco*, upon the application of the Prisoner, granted a rule calling upon the Petitioner to shew cause why a *Venire de novo* should not issue out of the Court for the retrial of the Prisoner for the offence charged in the Information, upon the ground that, after the jury had been empannelled to try the issue on the 10th of September, and before they had delivered their verdict, they were allowed the free use of the Newspapers of the day, which contained reports of the trial so far as it had gone, and in one of which Newspapers the heading given was "The *South Creek* Murder Case." On the 24th of September the Court made the rule absolute, and ordered that an entry be made on the Record of conviction herein that, after the jury had been empannelled to try the case, and before they had delivered their verdict, the jurors were improperly allowed the free use of the Newspapers of the day, which contained reports of the trial so far as it had gone; and in one of the Newspapers the heading given was "The *South Creek* Murder case;" and the Court then further ordered that a *Venire de novo* should issue out of the Court for the trial of *Murphy* upon the above charge.

The Petitioner submitted, that the judgment of the Supreme Court sitting *in banco* upon the hearing of the rule *nisi*, was erroneous, First; because the ordering by the Court of a writ of *Venire de novo*, in the circumstances above stated was, in effect, the granting of a new trial, and that the Court had no power to grant a new trial of the issue. Secondly; because the matters complained of, and by reason of which the writ of *Venire de novo* was ordered to issue, did not amount to a mis-trial, or give the Court jurisdiction, in any way, to set aside the verdict of the jury, or vacate, quash, or avoid the judgment thereon. Thirdly; because

the Court had no power to order the issue of a *Venire de novo* in any case of Felony where the verdict has been given by a jury duly empannelled. Fourthly; because, if the Court had power to order the issue of a *Venire de novo* in a case of Felony where the verdict has been given by a jury duly empannelled, the matters relied upon in the present case were not such as to warrant the exercise of such power. The Petitioner further stated, that by the practice of the Court he was precluded from obtaining the leave to appeal to Her Majesty in Council; and that questions of the highest importance to the proper administration of the Criminal Law in the Colony were involved in the case, and he prayed for special leave to appeal from the Order of the Supreme Court of *New South Wales*, of the 24th of September, 1867, whereby the verdict of guilty obtained for the Crown in the matter was set aside, and a new trial granted; and also that in the meantime all further proceedings in this matter might be stayed until the decision of Her Majesty in Council upon the appeal be made known in the Colony.

Sir *R. Palmer*, Q.C., and Mr. *Hannen*, for the Petitioner:—

This case is similar in every respect to *Reg* v. *Bertrand* (1), and we ask for an Order in the same terms as was made in that case.

LORD WESTBURY:—

In the circumstances, special leave to appeal will be allowed, upon the same conditions as were imposed in *Reg* v. *Bertrand*.

Solicitors for the Petitioner: Messrs. *Oliverson, Peachey, Denby, & Peachey*.

(1) Law Rep. 1 P. C. 520.

J.C.* 1867 Dec. 17.

CHARLES LA BLACHE . . . . . APPELLANT;

AND

JAIME SABINO RANGEL . . . . . RESPONDENT.

THE "NINA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Foreign vessel—Suit for wages—Admiralty jurisdiction — Practice regarding notice to the Consul in a suit for wages against a Foreign vessel—Admiralty Court Act of 1861*—Portuguese Commercial Code—Construction of Art.* 1489.

In a suit for wages by Seamen on board a Foreign vessel the Court of Admiralty has jurisdiction, but will not exercise it without first giving notice in accordance with the directions of the 10th of the Rules and Orders of 1859, for the practice of the High Court of Admiralty, to the Consul of the nation to which the Foreign vessel belongs, and if the Consul, by protest, objects to the prosecution of the suit, the Court of Admiralty will determine, whether it is fit and proper that the suit should proceed or be stayed. Such protest does not, *ipso facto*, operate as a bar to the prosecution of the suit, as the Foreign Consul has not the power to put a *veto* on the exercise of jurisdiction by the Court of Admiralty.

In such suit it makes no difference that the Plaintiff is a British subject: it is the nationality of the vessel, and not the nationality of the individual Seaman suing for his wages, that regulates the course of procedure.

Section 10 of the *Admiralty Court Act* of 1861, 24 Vict. c. 10, which gives jurisdiction to the High Court of Admiralty over any claim by a Seaman of any Ship (meaning thereby the Ship of any nation), only extends the previous jurisdiction in the ordinary case of wages, to wages under special contract, and disbursements on account of the Ship, and does not abolish the practice enjoined by the 10th of the Rules and Orders of 1859.

A British subject having shipped as *Piloto*, or Mate, in a Portuguese vessel, under a written instrument called a *Matricula*, or Roll, which contained the terms of his engagement; instituted a suit and arrested the vessel on her arrival at her port of destination, on a claim for extra wages and disbursements. The Owner resisted the claim, insisting that the vessel was a Foreign vessel, and that the *Piloto* and crew were engaged according to the law of *Portugal*, and had agreed, by the *Matricula*, to submit to the *Codigo Commercial* of *Portugal*, which, by Art. 1489, provides, that in case of any dispute between him and the Master, the Portuguese Consul in or near the port at which the vessel might chance to be, should have exclusive jurisdic-

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

tion to try and determine such dispute according to the law of *Portugal;* and he relied on the protest of the Portuguese Consul and the law of *Portugal*, as stated by him on affidavit, as applicable to the case. The Judge of the High Court of Admiralty held, that although that Court had jurisdiction in a case for wages against a Foreign vessel, the exercise of such jurisdiction was discretionary, and refused to entertain the suit, released the vessel from arrest, and condemned the Plaintiff in costs and damages. On appeal, held by the Judicial Committee, first, that though the High Court of Admiralty had a general discretionary authority to entertain such a suit, yet the Plaintiff having by his agreement consented to be bound by the Portuguese law, the Court below rightly released the vessel from arrest, and determined that the suit ought not to be proceeded with in that Court; but, as the suit had not come to, and was not ripe for a hearing, the condemnation of the Plaintiff in costs and damages was premature, and that part of the decree of the Court below reversed.

THIS was an appeal from an interlocutory decree of the High Court of Admiralty dismissing a suit brought by the Appellant against the ship *Nina*, for wages, disbursements, and compensation for wrongful discharge; and condemning the Appellant in costs and damages. (2 Ad. & E. 44)

The circumstances under which the suit arose were as follows:—

In the month of May, 1867, the Portuguese vessel *Nina* was at *Havana*, destined to proceed thence to *Greenock*, in *North Britain*, with a cargo of sugar.

The *Nina* belonged to the port of *Macao*, a Portuguese settlement in *China*, governed by Portuguese law; and the Respondent, a shipowner of *Macao*, was the sole registered owner thereof. While the *Nina* was at *Havana*, her then Master, *Francisco Dias Perez d'Almeida*, engaged a crew, among whom was the Appellant, a Master mariner, and a British subject. The whole crew were engaged by a written instrument called a *Matricula*, or Roll, made in conformity with the law of *Portugal*. The engagement of the Appellant was to serve as *Piloto*, or Mate, on the voyage to *Greenock*.

The Appellant, in pursuance of such engagement, shipped on board the *Nina*, and served as *Piloto* during the voyage from *Havana* to *Greenock*; and upon her arrival there, and leaving the *Nina*, he received from *D'Almeida*, the Master, the amount of the wages due to him, with some extras for disbursements, &c., but he claimed a considerable sum beyond that paid to him, on account, as he alleged, of disbursements made by him, wages, and compensa-

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tion, which the Master refused to pay; whereupon he instituted a suit against the Ship in the Scotch Court, and caused her to be arrested. The vessel was, however, by order of the Lord Ordinary, released, and the Appellant condemned in costs. The *Nina* thereupon sailed for *Cardiff*, and on her arrival there was again arrested at the instance of the Appellant, who instituted a suit in the High Court of Admiralty for the wages and disbursements so claimed by him. Having filed his petition setting forth his claim, the Respondent put in an answer denying the claim, and insisting that the *Nina* was a Portuguese ship, belonging to, and registered at *Macao;* that the crew were engaged according to the law of *Portugal*, by a *Matricula*, or Roll, whereby the Appellant, the *Piloto*, agreed to submit to the Portuguese Commercial Code, which provided, by Art. 1489, that in case of any dispute between him and the Master, the Portuguese Consul in or near the port at which the vessel might chance to be, should have exclusive jurisdiction to try and determine such dispute according to the law of *Portugal;* and the Respondent alleged that the Appellant had not made any attempt to have his disputed claim determined by the Portuguese Consul in *London*, who protested against the proceedings taken by the Appellant, and whom the Respondent was willing should determine the claim. The answer was supported, among other proofs, by the affidavits of the Portuguese Consul as to the law [which is set out in their Lordships' judgment (1)], and of the Master of the vessel as to the facts alleged in the defence. The Appellant replied by affidavit, in which he traversed the facts alleged against his claim, but did not deny the law applicable to the case and stated that he had offered at *Glasgow* to have his claims determined by the Portuguese Vice-Consul there. The case was heard on the 22nd of November, 1867, upon an interlocutory motion for the release of the Ship, when the Judge (Sir *Robert Phillimore*) gave judgment dismissing the suit, and condemning the Appellant in costs and damages, upon the ground that the protest of the Portuguese Consul-General was, in the circumstances of the case, a bar to the exercise of the jurisdiction of the High Court of Admiralty.

The Appellant applied for and obtained leave to appeal, in pursuance of the Statute, 24 Vict. c. 10, s. 32.

(1) See *post*, p. 45.

Dr. *Deane*, Q.C., and Mr. *V. Lushington* for the Appellant:—

The dismissal of the Appellant's suit, condemning him in costs and damages in a summary motion upon affidavit, was contrary to the rules and practice of the Court of Admiralty, and contrary to the due course of justice. The question to be determined was one of jurisdiction as well as of fact, and ought only to have been decided after a due course of proceeding and trial. There were no regular pleadings before the Court, and none of the requisitions prescribed by the 68th, 70th, 78th, and 79th Rules and Orders for pleading of 1859 were complied with; that alone would vitiate and render null the proceedings. The learned Judge of the Admiralty Court had no warrant of law to refuse to hear the suit of a seaman against a Foreign Ship, on the ground that the Consular Officer of the State to which the Ship belonged protested against the exercise of the Court's jurisdiction. The protest here was informal, it was a mere statement in an affidavit, and not filed as a petition on protest, as directed by the 70th of the Rules of Admiralty pleading. The High Court of Admiralty has always had jurisdiction over suits of wages brought by seamen against Foreign ships although such jurisdiction may not have been very frequently exercised. In *The Golubchick* (1) the late Judge of the Admiralty Court, after reviewing all the previous decisions, and referring to the cases of *The Two Friends* (2); *The Courtney* (3); *The Madonna d'Idra* (4); *The Wilhelm Frederick* (5); *The Adolph* (6); and the American case, *The Jerusalem* (7), stated that in such cases he should require a notice to be served by the Plaintiff on the Consular Officer, holding, however, that the jurisdiction of the Court was independent of the Consular Officer's consent. The true purpose of the notice to the Consul, which was given in this case, was to afford him an opportunity to assist or represent the Foreign owner in making good any legal defences, but the Admiralty Court having jurisdiction is bound to exercise it, and to hear the case upon the merits, if necessary. The decision in *The Golubchick* was probably the foundation of the Rule 10 of the Rules and Orders for the prac-

(1) 1 W. Rob. 148, 153.
(2) 1 Rob. 271–6.
(3) 1 Edw. 239.
(4) 1 Dod. 37.
(5) 1 Hagg. Adm. Rep. 138.
(6) 3 Ibid. 249.
(7) 2 Gallison, 198.

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tice of the Court of Admiralty, which were made in 1859 pursuant to the Statutes, 3 & 4 Vict. cc. 56 and 65, and 17 & 18 Vict. c. 78; that rule requires, in a wages cause against a Foreign vessel, notice to be given to the Consul of the nation to which the vessel belongs. In 1861 the *Admiralty Court Act*, 24 Vict. c. 10, passed, which, by section 10, enacts, that "The High Court of Admiralty shall have jurisdiction over any claim by a Seaman of any Ship for wages earned by him on board the Ship, whether the same be due under a special contract or otherwise, and also over any claim by the Master of any Ship for wages earned by him on board the Ship, and for disbursements made by him on account of the Ship." The purport of this section is to give the Court of Admiralty entire jurisdiction over Seamen's wages. There is no ouster of the jurisdiction of the Court in the case of a Foreign ship, even if there is a discretion left to the Court to exercise its jurisdiction in such a case. Assuming, however, that the Court of Admiralty had such a discretion, this was not a proper case for its exercise. The Appellant is a British subject, and though on board a Foreign ship, such Ship was bound to a British port, and in that view of the case, the voyage as to him was terminated on the arrival of the Ship, and his contract was completed. Moreover, the flag of the Ship was not satisfactorily proved; but the law of *Portugal* in such a case cannot bind a British Court, nor can a Foreign Consul have any authority apart from Treaty or agreement to restrain the jurisdiction of the Court; the maxim recognised by all Courts is "*actor sequitur forum rei.*" The suggestions of fraud on the part of the Appellant were disproved, and a good cause of action for wages and compensation, and for disbursements, was sufficiently established. We maintain, therefore, that the interlocutory decree of the Court below ought to be reversed with costs, and the suit be permitted to continue in due and ordinary course of law.

The *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Mr. *E. C. Clarkson*, for the Respondent:—

The protest and intervention of the Portuguese Consul against the exercise of the jurisdiction of the High Court of Admiralty was sufficient, though made only on affidavit: *The Herzogin Marie* (1);

(1) Lush. 292.

after such a notice the Court of Admiralty, if not altogether precluded, has a discretionary jurisdiction, which was rightly exercised in the circumstances of this case: *The Golubchick* (1); *The Octavie* (2); *The Franz et Elise* (3). The Appellant had, by the Ship's *Matricula,* or Roll, submitted himself to the provisions of the *Codigo Commercial* of *Portugal.* That appears from the seventh article of the special obligations contained in that instrument, a translation of which was in evidence in the Court below. By that Code he was restricted from taking any proceedings against the *Nina* or her Master, and was required to submit any dispute or disputes that might be existing between them, either to the Portuguese Vice-Consul at *Glasgow,* or to the Portuguese Consul-General in *London.* The affidavit of that Officer, which contains his protest, states very fully and very clearly the law on the case (4). The 10th Rule of Admiralty pleading (5) expressly provides, "that in a wages cause against a Foreign vessel, notice of the institution of the cause shall be given to the Consul of the State to which the vessel belongs, if there be one resident in *London.*" This, which is equivalent to a statutory enactment, is not repealed by sect. 10 of the *Admiralty Court Act* of 1861 (24 Vict. c. 10), which enlarges the jurisdiction, but does not limit the discretion of the Court in respect to the recovery of wages; nothing is there said regarding wages due from a Foreign ship. The arrest of the vessel by the Appellant at *Greenock* was most vexatious and quite unjustifiable; no offer was then made to submit the dispute between himself and the Respondent to the Portuguese Vice-Consul at *Glasgow,* though the Appellant now says he was willing to refer his claim to such Consul. If that is stated *bonâ fide,* why object now to a reference to the Portuguese Consul-General. In *The Milford* (6) the late learned Judge of the Admiralty Court, Dr. *Lushington,* refers to his judgment in the case of *The Golubchick,* and states the practice regarding the right of the Court of Admiralty in entertaining or refusing to entertain suits by Foreign seamen or against Foreign vessels. The former is now provided for by the *Merchant Shipping Act* (17 & 18 Vict. c. 104,

(1) 1 W. Rob. 143.
(2) Brown & Lush. 215.
(3) 5 L. T. 290; and 2 Maritime Cases, 26.
(4) See judgment, *post,* p. 45.
(5) Lush., Append. pp. vii. and viii.
(6) Swa. 362, 365.

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ss. 109, 191). The latter remains untouched, and, as we contend, has been most properly exercised in this case. We submit that the Respondent is entitled to have the interlocutory decree appealed from affirmed, and that the Appellant ought to be condemned in costs, demurrage, and expenses caused to us by the *Nina* having been kept under arrest in the suit.

The case stood over for consideration, and on the 20th of December, 1867, their Lordships stated, that they had agreed as to their report to Her Majesty, though they had not time to settle the reasons, but as the Ship was a Foreign vessel under arrest, they felt it right at once to order her release, and would reserve their formal judgment for a future day. Their Lordships expressed their opinion, that the decree appealed from ought to be varied in so far as it condemned the Appellant in costs and damages; the vessel to be released, and the Respondent dismissed from all further observance of justice, but that no Order ought to be made in regard to costs and damages, either on appeal or in the Court below; and further, that the cause should be remitted to the Judge of the Court from which the same was appealed, with directions to carry their Lordships' recommendations into effect. Her Majesty having, with the advice of Her Privy Council, approved thereof, an Order in Council was made of that date, in conformity with their Lordships' opinion so expressed.

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Their Lordships' formal judgment was now delivered by

Lord Romilly:—

In this case their Lordships, to avoid delay, intimated on the 20th of December last the nature of the report and recommendation they had agreed humbly to submit to Her Majesty; and Her Majesty was pleased, by Her Order in Council of the same date, to approve of that report, and to direct that the same be carried into execution. Their Lordships will now proceed to state more fully the reasons of that decision, which could not be stated at their last sitting before the adjournment of the Committee.

This is an appeal from the Court of Admiralty, which dismissed the Defendant from this cause and all further observance of justice therein, and condemned the Plaintiff in the costs and damages con-

sequent on the arrest of the vessel *Nina*, and also condemned him in the costs of the cause, and decreed the vessel to be released.

The vessel is a Portuguese vessel; the Appellant is a British subject.

In April, 1867, the Plaintiff commenced his services on board the *Nina*, then lying at *Havana*. He signed the articles in the common form which was supplied to him, a certified copy of which is in evidence. On arrival at *Greenock*, he alleges that he was, by *D'Almeida*, the nominal Captain, turned out of the vessel without payment of what was due to him for wages and disbursements on account of the Ship. Upon which he arrested her, but not prosecuting the case with sufficient diligence in *Scotland*, the suit was dismissed and the Ship released. The *Nina* then came to *Cardiff*, where the Appellant again arrested the Ship, and instituted this suit in the Admiralty Court for wages and disbursements.

In accordance with the 10th of the Rules of the Admiralty Court, published in 1859, notice of the suit was given to the Portuguese Consul residing in this country; whereupon the Consul sent in a protest, which, as far as is material, is as follows:—

"I have inspected the certificate of the *Matricula*, or Roll, under which the *Nina* was sailing when she arrived at *Greenock* in the month of June, 1867; and I say that such *Matricula*, or Roll, purports to have been duly executed, as required by Portuguese law, before *Fernando de Gaver e Tiscar*, the Consul-General of His Most Faithful Majesty the King of *Portugal* at *Havana*.

"By the law of *Portugal*, the Masters of all Portuguese vessels are required, before taking any Officer or seaman to sea in a Portuguese vessel, to enter into a *Matricula*, or Roll, setting forth the voyage upon which the ship is about to sail, and that the Officers and seamen about to proceed in her have agreed to serve for that voyage; and such *Matricula*, or Roll, is by Portuguese law the only mode in which a binding engagement can be entered into between the Master of a Portuguese ship and his Officers and Seamen; and the *Matricula*, or Roll, when entered is signed by the Master, Officers, and seamen.

"The Plaintiff in this action, *Charles La Blache*, has, by the said *Matricula*, or Roll, submitted himself to the provisions of the

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Codigo Commercial of *Portugal*, by which the said *Charles La Blache* is restricted from taking any proceedings against the *Nina* or her Master, and is required to submit any dispute or disputes that might be existing between them either to the Portuguese Vice-Consul at *Glasgow* or to myself.

"The said *Charles La Blache* has not, as I am informed and believe, submitted, or attempted to submit, any dispute or disputes existing between him and the Master of the *Nina* to the Portuguese Vice-Consul at *Glasgow;* and the said *Charles La Blache* has not submitted, or attempted to submit, any such dispute to me, which I would have readily entertained had the said *Charles La Blache* so done.

"The said *Charles La Blache* being subject to the provisions of the *Codigo Commercial*, and not having taken the measures adopted thereby to settle his dispute with the Master of the *Nina*, I respectfully submit that it is not within the jurisdiction of this Honourable Court to entertain the claim of the said *Charles La Blache;* and, as the Commercial representative of His Majesty the King of *Portugal*, I consider it to be my duty to respectfully and formally protest against the exercise of the jurisdiction of this Honourable Court in or about the dispute existing between the said *Charles La Blache* and the Master of the Portuguese ship *Nina*.

"*F. I. Van Zellar.*"

In this state of things several questions arise:

First; whether the Court of Admiralty has any jurisdiction at all in the case of a claim for wages by Seamen for service on board of a Foreign vessel.

Second; if it has such jurisdiction, whether, before exercising it, the Court is bound to send notice of the case to the Consul of the State to which the vessel belongs.

Third; if the Foreign Consul intervenes and protests, whether such protest operates *ipso facto* as an absolute bar to the prosecution of the suit, or whether the Judge is to take into consideration the grounds and reasons advanced by the Consul, and to determine according to his discretion whether, having regard to those grounds and reasons, it is fit and proper that the suit should proceed or be stayed.

Fourth; whether the grounds and reasons put forward in the protest of the Portuguese Consul in the present case are sufficient to satisfy the Court that the suit ought to be stayed.

On the first question, no doubt whatever is entertained by their Lordships. From the time of Lord *Stowell* down to the present, the Court of Admiralty has always asserted and exercised this jurisdiction. And if there remained any doubt on the subject, the 10th section of the Act, 24 Vict. c. 10, expressly gives jurisdiction to the Court of Admiralty in the case of any Ship, which, as the context and the rest of the Act plainly shew, means the Ship of any nation.

Nor have their Lordships any more doubt upon the second question. It has been argued at the bar that the 10th section of the Act, 24 Vict. c. 10, before referred to, has the effect of abolishing the practice enjoined by the 10th of the Rules of the Admiralty Court of 1859, before referred to, of sending notice to the Consul of the nation to which the Foreign ship belongs. To this argument their Lordships cannot accede. If it had been intended by the Legislature to abolish the practice, that 10th Rule, which it is to be observed has the force of Statute, would have been expressly referred to by the Act, and overruled. This is not done. The 10th section of the Act is perfectly consistent with the Rule. The only object of that section was to extend the jurisdiction which the Court already had in the ordinary case of wages, to the cases of wages under special contract, and of disbursements on account of the Ship.

With respect to the third question, their Lordships are of opinion that the protest of the Foreign Consul does not, *ipso facto*, operate as a bar to the prosecution of the suit. The Foreign Consul has not the power to put a veto on the exercise of its jurisdiction by the Court of Admiralty. It is well observed by Dr. *Lushington*, in the case of *The Golubchick*, that the jurisdiction of the Court of Admiralty cannot depend upon the will of a Foreign Consul; that as he cannot confer the jurisdiction, so he cannot take it away. If the Consul protests, but advances no reason, the suit will proceed. If he advances reasons for staying the suit, the Plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and then the Judge

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of the Court of Admiralty is to exercise his discretion, and determine whether, having regard to those reasons, with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, to use the words of Lord *Eldon*, in *White* v. *Damon* (1), not an arbitrary, capricious discretion, but one that is regulated upon grounds that will make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the Court in the sense before stated, is established by a long line of authorities, from the time of Lord *Stowell* down to the present. They are all one way, and they are, in the opinion of their Lordships, conclusive on this subject. And their Lordships concur in the decision of the late learned Judge of the Court of Admiralty in the case of *The Octavie*, that this discretion is not taken away by the 10th section of the *Admiralty Jurisdiction Act*, already referred to.

Upon the first three questions, then, their Lordships are of opinion that in the case of a suit for wages by seamen for service on board of a Foreign vessel, the Court of Admiralty has jurisdiction, but that it will not exercise it without first giving notice to the Consul of the nation to which the Foreign vessel belongs; and that if the Foreign Consul, by protest, objects to the prosecution of the suit, the Court will determine according to its discretion, judicially exercised, whether, having regard to the reasons advanced by the Consul, and the answers to them offered on the part of the Plaintiff, it is fit and proper that the suit should proceed or be stayed.

Their Lordships are further of opinion, that it makes no difference that the Plaintiff is a British subject. It is the nationality of the vessel, and not the nationality of the individual seaman suing for his wages, that must regulate the course of procedure.

With respect to the fourth question which is, whether the facts and reasons adduced by the Foreign Consul are established, and, if so, whether they are sufficient to induce the Court to stay the further prosecution of this suit; their Lordships think that they are so. The Plaintiff does not deny that the Roll or *Matricula* which he signed was in the usual form, and that it contained the usual printed conditions which now appear on the certified copy

(1) 7 Ves. 35.

produced in Court. By these he agrees to be bound by the Portuguese law; the Consul asserts the law to be, that in case of difference between the Seamen and the Captain the case shall be determined by the Portuguese Consul residing in the country where the Ship is arrested. The consequence is, that he is the Judge to determine the contest between the Plaintiff and Defendant, and he is ready and willing to hear and dispose of the case. No evidence is given to contest the accuracy of this statement, and this being so, their Lordships are of opinion, that the Plaintiff has agreed to refer such matters to the decision of the Portuguese Consul resident here, and that this constitutes a sufficient ground to induce the learned Judge of the Court of Admiralty to come to the conclusion that, in the proper exercise of his discretion, this suit should not be proceeded with.

It must be a very strong case in which their Lordships would be disposed to overrule the discretion of any Judge which had been *bonâ fide* exercised on judicial principles, and they are of opinion that the decision of the learned Judge is correct in dismissing the cause and releasing the vessel; but the decree in the Court below proceeds to award costs and damages to the Defendant against the Plaintiff. Their Lordships are unable to discover on what principle this can be rested. The question in the Court below, and now before their Lordships, is not whether the Plaintiff was right in his suit; for the suit has not properly come to any hearing on the merits. The evidence necessary for arriving at a decision on the merits has not been produced. The only question properly before the Court below was, whether the suit instituted by the Plaintiff should be allowed to proceed or not; in other words, whether the facts and reasons set forth by the Portuguese Consul were sufficient to induce the Court to refuse to allow the suit to proceed, and these facts and reasons were the only matters which could be properly contested in the Court below. The learned Judge arrived at the conclusion, as their Lordships think correctly, that the suit should not proceed; but that very circumstance made it impossible for the Court to come to a safe and satisfactory conclusion as to what would have been the result if the suit had been allowed to proceed, the proofs on both sides given in the usual manner, and the cause heard on the merits.

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Their Lordships, therefore, are unable to concur with the learned Judge of the Court of Admiralty in that portion of his decree which fixes the Plaintiff with the payment of costs and damages, and have, therefore, humbly reported to Her Majesty that the decree of the Court of Admiralty be varied by striking out of it so much as relates to such costs and damages. The decree runs thus:—Her Majesty dismisses the Defendant from this cause and all further observance of justice therein, and decrees the said vessel to be released; but their Lordships do not think fit to make any order as to costs, either in the Court below, or in the appeal to Her Majesty in Council.

Solicitors for the Appellant: *Cotterill & Sons.*
Proctors for the Respondent: *Clarkson, Son, & Cooper.*

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KO KHINE AND OTHERS . . . . . APPELLANTS;

AND

RICHARD SNADDEN . . . . . RESPONDENT.

ON PETITION FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

Appeal—Subject matter in suit under appealable value—Decision to govern other suits—Practice—Special leave to appeal.

In circumstances, special leave to appeal granted, although the amount involved in the action was under the appealable value, Rs.10,000. There being (1), an important question of law raised, and eleven other actions brought involving the same question of law, and which had been directed by an Order of the Court below to be heard upon the same evidence and concluded by the same judgment; and (2), the aggregate amount involved in the actions being more than the appealable value.

THIS was a petition for special leave to appeal from a judgment of the High Court of Judicature at *Fort William*, in *Bengal*, and an Order made by that Court refusing leave to appeal to Her

* *Present*:—LORD WESTBURY, SIR JAMES WILLIAM COLVILE, SIR RICHARD TORIN KINDERSLEY, and SIR LAWRENCE PEEL.

Majesty in Council, on the ground that the sum involved did not amount to Rs.10,000, the appealable value prescribed by the Order in Council of the 10th of April, 1838.

The petition set forth that the Petitioners, *Ko Khine* and others, brought an action in the Court of the Recorder of *Moulmein*, being suit, No. 153 of 1865 of that Court, against *Snadden* and others to recover fifty-two logs of teak timber in specie, marked [GG] valued at Rs.3380, being a portion of 609 logs worked out of *Mhineloonghie* Forest in *Burmah*. That besides the above action brought by the Petitioners, eleven other actions were brought in the same Court in respect of different portions of the same 609 logs by various other Plaintiffs against the Defendants, and that each of these actions involved the same issue, namely, whether the Defendants had or had not right to the *Mhineloonghie* timber, the subject of the first action: that these actions were numbered in the Court as regular suits from Nos. 161 to 176 of 1865 respectively; that *Burn* and *Snadden*, two of the Defendants, appeared and answered in the action No. 153, and also in the eleven other actions before mentioned; and that, on the 3rd of October, 1865, an Order was made by Mr. *J. Pitt Kennedy*, the Judge of the Recorder's Court, by which it was ordered, with the consent of all parties, that all legal evidence to be taken in the action No. 153, should be evidence in the several other actions. That issues having been prepared and ordered in such action at the instance of the Petitioners it was, on the 18th of December, 1865, ordered by the Judge that the issues in the several actions should be the same as the issues in the action, No. 153; that on the 8th of May, 1866, it was ordered by the Court, on the application of the Plaintiffs in the several actions, that the names of two of the Defendants be withdrawn from the record and that the action proceed against *Snadden*. That on the 18th of May, 1866, and on various subsequent days, the action No. 153 came on for trial, and evidence was adduced on both sides, and on the 24th of August, 1866, the Court pronounced judgment in favour of the Plaintiffs, and it was decreed that the Plaintiffs should recover from the Defendant in specie fifty-two logs of teak timber marked with a double sickle (ϙϙ) as claimed in the plaint, together with the costs of suit; and it was further adjudged that such decree should govern also the

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cases Nos. 161 to 176. That the judgment of the 24th of August, 1866, was appealed from by the Defendant, *Snadden*, to the High Court of Judicature at *Fort William*, in *Bengal*, and judgment was pronounced by that Court on such appeal, No. 298 of 1866, on the 22nd of March, 1867. That by this judgment the High Court reversed the judgment of the Court below of the 24th of August, 1866, and ordered that decree to be given for *Snadden*, the then Appellant, with all costs of that proceeding. That the judgment of the High Court so pronounced was declared by the Court to relate only to the suit 153, being the suit at the instance of the Petitioners; that of the eleven other actions which were originally decided along with the action No. 153 at the instance of the Petitioners by the judgment of the Recorder of *Moulmein* of the 24th of August, 1866, seven only involved an amount sufficiently large to entitle the parties to appeal to the High Court of Judicature at *Fort William*, and, accordingly, that these seven actions were so appealed, and, on the 29th of March, 1867, the High Court pronounced judgment in the same. That in giving such judgment the Court, among other things, with respect to the other seven actions, observed, "it is extremely doubtful whether, in accordance with the Code of Civil Procedure, sects. 351-2, we should be competent to remand these cases, if even we thought that justice required us to do so. We might, indeed, permit the reception of additional evidence, but, assuredly, the facts of the case would afford no justification for our doing so, and we are bound by a recent decision of the Judicial Committee (in the case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (1)) to abstain from admitting further evidence on appeal without any substantial cause for so doing, to be recorded in the proceedings. We have, therefore, no choice but to reverse the several decrees of the Court below, and we reverse them accordingly, with all costs of these proceedings." The petition then set forth that the total value of the seven actions and of the action at the instance of the Petitioners amounted to Rs.34,990; and that the Petitioners applied within the time limited to the High Court for leave to appeal to Her Majesty in Council, on the following among other grounds, viz., that although the action No. 153 at the instance of the Peti-

(1) 11 Moore's Ind. App. Cases, 28.

tioners, was valued at only Rs.3380, yet the right of *Snadden*, the Defendant, to the whole 609 logs of timber before mentioned was involved in it, and because seven other actions were made to follow the result of the action No. 153 at the instance of the Petitioners; but that the High Court refused such leave to appeal, and the Petitioners submitted, that not only was the right of *Snadden* to the whole of the 609 logs of timber indirectly involved in the action at the instance of the Petitioners, and the eleven before-mentioned actions considered by the Recorder at *Moulmein* to be governed by the decision in the action, and the seven appeals to the High Court made to follow the decision in the action at the instance of the Petitioners, but that the judgment practically involved a value of Rs.34,990, and that twelve other actions were depending involving the same question in regard to the *Mhine-loonghie* timber; and they further stated, that important questions at law were involved in the action so tried, and also in the seven other actions which, by the decision of the High Court, were made to follow the result of that action, and prayed for special leave to appeal from the decree of the High Court of the 22nd of March, 1867, and also from the Order or judgment of that Court rejecting the petition for special leave to appeal to Her Majesty in Council.

Mr. *J. S. Will*, for the Petitioners:—

Besides the suit in which leave to appeal has been refused, there are seven other cases involving the same question of law now pending in the High Court of Judicature, all of which will be governed by this case. Although the subject matter does not amount to the appealable value, Rs.10,000, as required by the Order in Council, 10th April, 1838, yet the aggregate amount of the suits is Rs.34,990. Act, No. XXI. of 1863, ss. 3 and 27, declares the appealable value to be Rs.10,000 involved directly or indirectly in the claim, which meets this case. In similar circumstances special leave was granted: *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (1).

(1) 7 Moore's Ind. App. Cases, 548. See *Moofti Mohummud Ubdoollah* v. *Baboo Mootechund* (1 Moore's Ind. App. Cases, 363).

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Their Lordships, acting upon the authority of the case cited, granted the leave asked for upon the usual terms of security being given for costs.

Agent for the Petitioners: *William Robertson.*

J. C.* 1868 *Feb.* 24.

In re McINNES' PATENT.

Letters Patent—Specification—Subject matter of invention—Combination of chemical substances in common use—Profits.

The subject matter of an invention was the employment of a metallic soap, composed of well-known chemical substances in common use, which the specification described as applicable for coating of iron and wood to prevent the fouling of ships' bottoms, and for other useful purposes. Prolongation of the term of such Letters Patent refused on the ground, first, that the recommendation of an extension being discretionary, it would be detrimental to the public interest to grant the exclusive benefit of a metallic soap made from substances in common use; and, secondly, that the Patentee had, as it appeared from the accounts, been adequately remunerated for his invention.

THE Patentee in this case applied for an extension of the term of Letters Patent, dated the 21st of June, 1854, for his invention of "An improved composition for coating the bottoms of iron ships to prevent their fouling, and other useful purposes." The specification described the invention to consist in the application of a metallic soap, in which might be combined mineral poisons, to the bottoms of iron or wooden ships, to prevent their fouling at sea by the adhesion of animal and vegetable matter, which was to be applied to the surface, to be coated in a liquid state. The mode of preparing a metallic soap the Patentee described as follows:—"I take a quantity of what is termed in commerce, 'pale yellow soap,' which is a compound of fat, resin, and an alkali. I dissolve the soap in water, and then add a solution of a metallic salt, mutual decomposition takes place, the fat and resin combine with the metal in a state of oxide, forming a metallic soap, and alkali com-

* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT).

bines with the acid of the salt, which remains in solution. The mass of soap is then well washed in several waters, and when cool pressed to remove as much adhering water as possible, any remaining water is driven off by heat in an iron or other vessel. In preparing a metallic soap for the purposes here intended, I prefer to employ a salt of copper, and, in preference, the sulphate, or, as it is commonly called, 'blue vitriol,' I dissolve 'pale yellow soap' in water by steam, or otherwise, and to every hundred parts thereof I add from forty to fifty parts of sulphate of copper (blue vitriol), or such quantity as will cause a complete decomposition of the soap. Should there be an excess of salt of copper (blue vitriol) it will do no injury, as it will be removed by the after washings. To coat the bottom of a ship or vessel with the composition I heat it in an iron or other vessel until it becomes sufficiently fluid; then with a stiff brush apply, while hot, a moderately thick coat. The object of my invention is not only to present a poisonous surface (when a cupreous or other poisonous soap is used), but that it shall become smooth and polished by the friction of the water on the composition while the vessel is passing through the water, thereby presenting a surface to which neither barnacle nor sea-weed can adhere. The composition or compositions hereinbefore described may have other poisonous ingredients mixed herewith, such as arsenic, oxides of mercury, or other substances known to act injuriously on animal or vegetable life. When a cupreous or other poisonous metallic soap is used they will be found to be unnecessary."

The petition stated that prior to this invention it had been a common practice to coat the bottoms of ships with sheeting made of very expensive metals and alloys, and for that purpose copper, or *Muntz's* yellow metal, had been usually employed; that the expense attending that system of coating was very great, and in addition to the objection on the score of expense, it was found that for the coating of iron vessels, which of late years had been built in great and increasing numbers, the use of sheeting made of copper or its alloys was very objectionable, owing to the chemical and galvanic action that takes place between copper and its alloys and iron when the metals are exposed to the action of sea-water; that the Petitioner had devoted much time and attention in discovering a suitable composition that might be economically applied directly to

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the bottoms of wooden or iron ships, and which would not in the latter case act injuriously upon the iron; and that he at last succeeded in discovering that he could use a composition consisting of yellow soap combined with certain mineral substances which act as poisons on sea-weeds, shell-fish, and other vegetable or animal deposits, and which composition had been found, after long trial, to be an economical and efficient coating for the bottoms of ships, and had supplied the *desideratum* which was every year becoming more requisite, especially for iron ships; and which further increased the speed, as it gave the bottom of a vessel a smooth slippery surface peculiarly adapted to facilitate a rapid passage through the water: That from the prejudice among shipowners the invention was very slow in coming into use, and in consequence of the loss by experiments he had not realised an adequate remuneration, and he prayed for an extension for fourteen years.

No caveat was entered.

Evidence was given shewing the value of the invention as an anti-fouling paint in preventing the adhesion of barnacles or sea-weed, and presenting a permanent slippery surface, which tended to increase the speed of the vessel's progress through the water. The Patentee, who was examined, admitted that the patented article was not new as a chemical compound, but that it was new, so far as he knew, in its application for the purpose of coating ships' bottoms. He further said that the articles forming the composition were sold to purchasers to be used *ad libitum*. From the accounts filed it appeared that, although there had been no profits for the first years of the Patent, yet the Patentee had during the last three years derived a net profit of £2835. 16*s*. 11*d*. The Patentee had debited himself for the early years of the Patent with the sum of £400 a year, and for the latter years with £200, as a charge for personal superintendence in the manufacture; he also charged for the raw material used in making the composition, and for commission allowed to Agents for sales.

Sir William Erle:—

On the face of the specification it appears that the Patent was granted for the exclusive use of substances known and common to all mankind, to be applied in combination to prevent the action

of sea-water. Is such a combination the proper subject of a Patent? Although this Tribunal does not adjudicate upon the validity of a Patent, yet in a case where the validity is doubtful, their Lordships exercise a discretion in recommending, or otherwise, the Crown to prolong the term.

Mr. *Grove*, Q.C., and Mr. *Aston*, for the Petitioner:—

This case is distinguishable from *McDougal's Patent* (1). There the subject matter was a well-known chemical acid used as a sanitary agent, in common use before and after the grant of the Letters Patent. Here the Patentee does not claim the exclusive use of the composition except as an insoluble protecting substance, before unknown, to be applicable to the coating of ships' bottoms. In *Hills* v. *London Gaslight Company* (2) the Patent was for purification of gas by a known chemical ingredient, but as it had never before been applied to that particular purpose it was held to be the fit subject of a Patent. So, in *Oxley* v. *Holden* (3), which was an invention claimed by the Patentee as applicable to Railway Carriages, the Court of Common Pleas sustained the Patent, as being a mode of applying known materials in a new way.

Sir William Erle directed attention to the accounts furnished by the Patentee.

Mr. *Grove*, Q.C.:—The charge by the Patentee of £400 for his personal superintendence with respect to the Patent for the early years, when the Patent was totally unproductive, and £200 for the latter years, was a fair remuneration, and £200 was a proper deduction to be made in estimating the profits of the Patent: *In re Perkins' Patent* (4). So also was the allowance of commission on sales: *In re Poole's Patent* (5). He was also a Manufacturer of the patent article, and entitled to deduct for manufacturer's profits: *In re Betts's Patent* (6).

Mr. *Archibald*, for the Crown:—

Submitted, whether the invention was properly the subject of a

(1) *Ante*, p. 1.
(2) 5 H. & N. 312.
(3) 8 C. B. (N.S.) 666.
(4) 2 Webs. Pat. Cases, 16.
(5) Law Rep. 1 P. C. 514.
(6) 1 Moore's P. C. Cases (N.S.), 49.

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Patent, as it was simply for the application of known substances in common use, which might be sold as articles of commerce, and might be combined or not by the purchasers, at their option.

Sir William Erle:—

Their Lordships are not prepared to recommend that the prayer of this petition should be granted.

Extensions of Patents have been recommended by this Committee where there has been great merit on the part of the Inventor, and where there has been inadequate remuneration, and where no detriment to the public interest could arise from such extensions. Their Lordships consider this invention both useful and important; but, having regard to the accounts which are in evidence, they see that there has been some remuneration to the Patentee, and they are by no means satisfied that that remuneration is not sufficient. The alleged loss by experiments has not been proved before their Lordships in any degree. There has been for some time considerable profit, and the sum total of that profit for the last three years, as appears from the accounts, amounts to the sum of £2835. 16*s.* 11*d.* Their Lordships also, taking into consideration, with reference to the public interest, that the individual substance, for the application of which the Patent is sought to be prolonged, is not specifically defined, every kind of metallic soap being within the limits of the specification; are of opinion, that many questions affecting the Patent might be raised if any metallic soap was used by the public in ignorance of the specification being as wide as it is. On the whole, therefore, their Lordships are of opinion, that they ought not to recommend Her Majesty, under such circumstances, to grant a prolongation.

Solicitors for the Petitioner: *Torr, Janeway, & Tagart.*
Solicitors for the Treasury, for the Crown:

THE REV. LEWIS RUGG . . . . . APPELLANT;

AND

WILLIAM HOWLEY KINGSMILL . . . . RESPONDENT.

J. C.*
1867
Dec. 16, 17.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Faculty for vault—Discretion of Ordinary in granting—Right to oppose—Grant of, under special conditions.

The grant of a Faculty for the appropriation of a vault in a Church or Chapel is entirely within the discretion of the Ordinary. The Ecclesiastical law requires, before such Faculty is decreed, that all persons interested in opposing the grant should be heard before the Ordinary. The Vicar or perpetual Curate of a Church, though entitled to officiate in and have free access to the Chancel, has no right to fees for the erection of monumental tablets, or for the construction of vaults in the Chancel. A Faculty for that purpose may be legally granted without his consent; but he has a *personâ standi*, by reason of his position as Incumbent, to oppose the grant of such a Faculty.

A Faculty for the appropriation of a family vault under the Chancel of a District Church, having been applied for by the lay proprietor of the great tithes, and the owner of the land immediately adjacent to and in the vicinity of the Church, was objected to by the Vicar of the Parish, because, among other reasons, the access to it being only from the exterior, and no Churchyard or burial ground attached, there was no consecrated ground outside the Church on which any part of the burial service could be performed; such Faculty was, however, granted by the Ordinary, and the grant thereof confirmed on appeal by the Judge of the Arches Court:—*Held*, by the Judicial Committee, that though the granting of such a Faculty was entirely within the discretion of the Ordinary, such discretion ought to be exercised so as to prevent the possibility of a misuse by the grantee, and that, in the circumstances, the grant ought only to issue on the condition that the grantee appropriated, and consented to the consecration, of a sufficient piece of ground near the opening of the vault, to be so consecrated for the sole and special purpose of burials in the vault, and such Faculty decreed accordingly.

The Ordinary cannot compel an Incumbent by Ecclesiastical censure to perform the burial service on the unconsecrated ground in which the only entrance to the vault is to be found.

THIS was originally a cause in the Consistorial Court of *Winchester*, of granting a Faculty to appropriate and confirm a family vault or burying-place underneath the Chancel of the Parish Church

* *Present:*—LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, SIR RICHARD T. KINDERSLEY, and SIR ROBERT PHILLIMORE (DEAN OF THE ARCHES).

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of *Sydmonton*, in the County of *Southampton*, to the Respondent, *William Howley Kingsmill*, of *Sydmonton Court*, his family and successors, being proprietors of the mansion and estate, and inhabitants of the Parish of *Sydmonton*.

The petition, which was addressed to the Vicar-General and Official Principal of the Consistorial and Episcopal Court of *Winchester*, described the Petitioner to be the owner and occupier of the above-mentioned mansion, with a considerable estate adjoining, and lay impropriator of the great tithes of the Parish of *Sydmonton*. It stated the rebuilding of the Parish Church of *Sydmonton*, and the making of the vault, as a burying-place for his family, in 1853, by the Petitioner's late father, and it prayed for a Licence, or Faculty, as above stated.

The granting of the Faculty was opposed by the Appellant, the Incumbent of the Parish of *Ecchinswell* with *Sydmonton* annexed. He admitted, in his allegation, the facts stated in the Respondent's petition; as to the ownership of the property, and the rebuilding of the Church by himself and his father; but alleged that such rebuilding was without the permission of the Vicar of the Parish for the time being, he also stated that there was no ground or Churchyard annexed to or surrounding the Church; and that it had never been dedicated, consecrated, or used for the burial of the dead, the only entrance to the vault in the Church being in the garden or private grounds of *Sydmonton Court*, which entrance was on unconsecrated ground, and he stated that save for the objections on Ecclesiastical law to the granting of a Faculty he would not object to such grant or licence, subject to the payment of his costs and fees. To these objections the Respondent, in a responsive allegation, replied, affirming his former allegations; and a further reply by the Defendant, and final allegation by the Respondent, pleading proofs of the consent of the Patron and Incumbent for the time being for the pulling down and rebuilding of the Church, completed the pleadings.

On the 24th of August, 1866, the Vicar-General, and Official Principal of the Consistorial Court of *Winchester* (*Charles Sumner*, Esq.) gave judgment in favour of the Respondent, and directed a Faculty to issue as prayed.

From this judgment the Appellant appealed to the Arches Court

of *Canterbury*, and on the 4th of May, 1867, the Judge of that Court (The Right Hon. Dr. *Lushington*) delivered his judgment, confiming the decree of the Court below with costs (1). The present appeal was from that judgment.

The Appellant, in person:—

The facts of the case are very simple. *Ecchinswell-with-Sydmonton* formerly formed part of the Parish of *Kingsclere*, but, by an Order in Council of the 19th of August, 1852, was formed into a distinct and separate Parish for Ecclesiastical purposes. The Church of *Ecchinswell* then became the Parish Church of the newly-formed Parish, there being a Churchyard annexed to it, and burials, christenings, and marriages having been lawfully celebrated there. Prior to 1849 there had been a Chapel in the district of *Sydmonton*, standing in the private ground of the Respondent's father, Mr. *William Kingsmill*. In 1843 a vault was constructed by him underneath the Chancel of the Chapel. In 1840 the Chapel was pulled down, and was rebuilt by him in 1853. There is no consecrated ground annexed to the Chapel. There is no Register Book for burials in the Chapel, and no record of any burial ever having taken place therein, the inhabitants of the District having been accustomed to be buried at *Kingsclere* or *Ecchinswell*. The vault in question is nine feet by fifteen, and about six feet high. The entrance to it is by steps from the garden belonging to Mr. *Kingsmill*, and there is no access to it from the door of the Chapel, or otherwise, except through his private grounds. Now, even if the original Chapel was consecrated, it is not sufficiently pleaded or proved that such consecration was with the consent of the Vicar of the Parish Church of *Kingsclere* or *Ecchinswell* for the time being, and I contend that without consent no consecration would be valid: *Carr* v. *Marsh* (2); and without legal proof, the consecration cannot be presumed: *Moysey* v. *Stillcoat* (3). Where there has been no consecration the Ecclesiastical Court can have no authority to grant a Faculty for a vault. The leave given to the Vicar for the time being to pull down the Chapel is not sufficiently proved; it is only pleaded in the Re-

(1) Law Rep. 1 A. & E. 343. (2) 2 Phil. 198.
(3) 2 Hagg. Ecc. Rep. 30.

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spondent's final allegation, and it is nowhere shewn that the present Chapel occupies exactly the same site as the former building. The vault in question was made subsequent to the rebuilding and to the consecration of the Chapel, if that was ever legally performed. There is, moreover, no possibility of the Churchwardens performing their duties in compliance with the 20th, 85th, and 86th Canons of the Church, without the permission of the owner of the land adjacent to the Chapel. The practice of burying within Churches did indeed, though rarely, obtain before the use of Churchyards, but was, by authority, restrained when Churchyards became frequent and appropriated to that use: *Cripps* on the Church and Clergy, p. 758 (4th Ed.); *Kennett's* Par. Ant. 592; *Gibs.* 453; *Comyn's* Dig. 178, tit. "Cemetery" (B.). This is at once a sufficient reason why the Faculty prayed for ought not to have been allowed. But where the inhabitants of a District have no common law right of burial in such District, an Ecclesiastical Court has no jurisdiction to grant to one family of that District a Faculty for the privilege of burial, or for the exclusive privilege of burial, in a Church or Chapel in such District. Even assuming that an Ecclesiastical Court has jurisdiction to grant such a Faculty as is sought for here, the granting of Faculties for vaults in a Church or Public Chapel has for a long time past been discouraged by the Superior Ecclesiastical Courts, by the Ecclesiastical Commissioners, and by the Burial Acts of the Legislature, as injurious to the health of the Parishioners; and Faculties for such vaults have not been granted, except in cases free from other objections, and where all parties interested have been consentient. This is not such a case, and therefore the Faculty ought not to have been granted. But even if granted it ought to be upon the condition that the Respondent appropriates such a piece of land round the Chapel for consecration as will place the entrance to the vault in question on consecrated ground, so that the whole or such part of the burial service as the Minister may think fit may be performed thereon, and that no Minister or Incumbent of the Chapel may be required to perform any part of the service on unconsecrated ground, and thereby render himself, as well as those attending the Funeral, liable in law to be treated as trespassers.

Dr. *Deane*, Q.C., and Dr. *Swabey*, for the Respondent:—

This was a proper case for the exercise of its discretionary authority by the Ecclesiastical Court. The Official Principal in the Consistory Court of *Winchester*, as well as the late Judge of the Arches Court of *Canterbury*, both thought so, and the Faculty was duly decreed. [LORD ROMILLY:—Is the Faculty good which does not provide for the performance of the funeral service on consecrated ground? Here there is no Churchyard or ground on the outside entrance to the vault which has been consecrated.] There may be no case in which a Clergyman has been compelled to perform service on unconsecrated ground, but the circumstances are different here, as the steps of the vault are part of the building which is consecrated. The objections raised and argued by the Appellant are not tenable. There is no question but that the Chapel at *Sydmonton* is a District Church, the Order in Council for its separation from the Mother Church at *Kingsclere*, with the consent of the Patron of the Living and the Incumbent for the time being, are all satisfactorily proved. The dedication and consecration of the Church as it now stands, by the Bishop of the Diocese, is pleaded and proved. It is too late now to question the due and legal consent of all requisite parties. The authorities cited by the Appellant have no bearing, they apply to another state of things, the only question open for discussion is one of discretion:—Whether the Faculty applied for was properly granted? The objections urged by the Appellant of the want of a Churchyard, adjoining the Chapel, on which such part of the Burial service as the Minister may think fit to perform out of the Church might be read without the possibility of the Minister and mourners being trespassers in law, is an almost impossible contingency, and, as such, combatted and disposed of by the learned Judge of the Arches, he would not be deterred by such an ideal possibility. There is, moreover, an answer to such an objection; the steps of the vault at its entrance are part of the Church, and consecrated with it; the Minister when standing on the steps, therefore, would neither be a trespasser, nor performing any part of the service on unconsecrated ground; that is enough to satisfy the most scrupulous conscience.

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Judgment having been reserved was now (Mar. 11, 1868) delivered by

SIR ROBERT PHILLIMORE :—

This is an appeal from a sentence pronounced by the late Judge of the Arches Court at *Canterbury*, whereby he affirmed the sentence of the Consistorial Court of *Winchester*, which decreed a Faculty to issue to Mr. *Kingsmill*, authorizing the appropriation to that gentleman of a vault under the Chancel of *Sydmonton* Church. This Church is situate in the Parish of *Sydmonton*, in the County of *Southampton*.

It appears that the whole property, as well as the principal house in the Parish, belongs to Mr. *Kingsmill*, and that, with the exception of the consecrated ground upon which the Church is built, he is proprietor of all the land up to the very walls of the Church, which has no burial ground attached to it.

In the year 1849 there was a Chapel which occupied the site of the present building. Under the Chancel of this former Chapel the father of Mr. *Kingsmill* possessed a vault. In 1849 the Chapel was pulled down. In 1852, *Ecchinswell-with-Sydmonton*, which formerly formed part of the Parish of *Kingsclere*, was formed, under an Order in Council, bearing date the 19th of August, 1852, into a distinct and separate Parish for Ecclesiastical purposes.

In September, 1852, Mr. *Rugg*, the Appellant, was instituted Incumbent of *Ecchinswell-with-Sydmonton*. In 1853 the present Church was built by Mr. *Kingsmill* at his sole cost and expense. In August, 1864, the Church was consecrated. In August, 1865, the Faculty now in question was granted by the Consistory of *Winchester*.

Before a Faculty, either to the Parishioners in general or to a private inhabitant of the Parish, can be decreed, the Ecclesiastical law requires that all persons interested in opposing the grant should have an opportunity of being heard before the Ordinary.

The Faculty which has been decreed in this case is, as has been stated, for a burial vault underneath the Chancel.

The objector to the grant of the Faculty is the Incumbent, who is either Vicar or Perpetual Curate. The Applicant for the Faculty is the Impropriate Rector, who resides in the Parish,

and whose father appears to have rebuilt and partially endowed, at his own cost, the Church.

The Vicar or Perpetual Curate, although entitled to officiate in and to have free access to the Chancel, has no right, strictly speaking, to fees for the erection of monumental tablets, or for the construction of vaults (in the very rare instances in which they should be allowed) in the Chancel; but he has certainly a *personâ standi*, by reason of his general spiritual position as Incumbent, to oppose the grant of such a Faculty as the present.

The objections of the Appellant to the sentences from which he appeals are various:

First, he contends that the Ecclesiastical Court had no jurisdiction to grant this Faculty. He supports this objection by reference to the facts that there is no burial ground attached to this Church, —that no funeral has ever taken place there,—that the inhabitants of the District have consequently no general right of burial connected with the Church, and his argument appeared to extend so far as to question the validity of the consecration of the Church itself by the Bishop.

Their Lordships, however, see no reason to doubt that the Bishop had full authority to consecrate this building, and they are of opinion that the objection founded on the absence of any burial ground, and of any general right of burial on the part of the Parishioners, did not render unlawful the act of the Ordinary, though it imposed upon him the duty of exercising with much caution the discretion which the law has vested in him as to granting a Faculty of this kind.

The Appellant further contended that the grant of this Faculty was bad upon the ground that the proper forms prescribed by the practice of the Ecclesiastical Court had not been complied with. Their Lordships, however, are of opinion that the case was regularly and properly conducted in the Diocesan Court of *Winchester*, and that this objection cannot be sustained.

The Appellant contends that this Faculty could not be granted without his consent, but this contention is not supported by authority or practice. The Vicar or Perpetual Curate, as has been stated, is entitled to be heard against the grant of the Faculty, and his objections ought, of course, to be considered by the Ordinary, but

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the discretion of the Ordinary is not fettered or taken away by the dissent of the Vicar.

There are objections, however, urged by the Appellant which are of a more serious character; they may be all ranged under the general head—that the discretion of the Ordinary was unwisely exercised in the grant of this Faculty.

From the decision of the Ordinary an appeal lies to the Archbishop, and ultimately to the Crown, under the advice of the Judicial Committee of the Privy Council.

If we think that the grant of this Faculty, though not absolutely illegal, was, as it at present stands, indiscreet, and likely to give rise to future troubles and difficulties in the Church and District of *Sydmonton*, which were not duly considered by the Ecclesiastical Courts, we ought to advise Her Majesty accordingly.

The Appellant has pointed out to their Lordships that the ground upon which the Church stands alone is consecrated, that the jurisdiction of the Ordinary depends upon the consecration of the ground, and does not extend over any part of the ground which comes up to the very walls of the Church. The legal consequences of this circumstance, upon which the Appellant insists, will presently be noticed.

Their Lordships, having regard to the peculiar circumstances of this Church and Parish, are not disposed to dissent from the opinion expressed by the Judge of the Arches Court, that the judicial discretion of the local Ordinary was lawfully exercised in granting permission to Mr. *Kingsmill* to retain, for the use of himself and his family, so long as they shall remain proprietors of *Sydmonton Court* (for this must, of course, be a provision contained in the instrument), the vault which has been constructed underneath the Chancel.

Their Lordships desire that it should be understood that they do not mean to express any approbation of a general practice of granting Faculties for interments in Chancels or the body of Churches. On the contrary, they are of opinion that very exceptional circumstances can alone justify such an exercise by the Ordinary of the discretion which the law has vested in him.

With respect to the particular Faculty the consideration of which is now before their Lordships, they have come to the conclusion

that it ought not to be issued, at the present time, in the manner proposed.

Their Lordships are extremely reluctant to interfere with the exercise of the discretion in these matters by the local Ordinary, and they fully recognise the expediency of the rule of practice which discountenances such interference. But their Lordships think that the objection to the immediate issue of this Faculty, while the only entrance to the vault is in the private and unconsecrated ground of Mr. *Kingsmill*, is deserving of great consideration. In the first place it is clear that the Ordinary could not compel the Incumbent by Ecclesiastical censures to perform the burial service in the unconsecrated ground in which the only entrance to the vault is to be found. It has not been argued that the Ordinary could so compel the Incumbent: indeed, it has been very properly admitted by the Counsel for Mr. *Kingsmill* that no authority can be found for such a practice.

In the next place it appears to their Lordships to be inexpedient that the spot upon which a portion at least of the burial service is usually performed by the Minister should be exempt from the jurisdiction of the Ordinary.

It is true that the Ordinary would have jurisdiction over the vault itself, and that the whole service might lawfully, their Lordships think, in the peculiar circumstances of this case, be performed in the Church, and the corpse afterwards taken into the garden, and deposited in the vault; and their Lordships do not mean to say that the Ordinary might not be enabled to punish any unlawful proceedings which might precede or accompany the act of burial; but it is also true that the absence of any Ecclesiastical jurisdiction over this spot of ground might afford an apparent impunity to evade the law, and thereby possibly cause a scandal in the Parish.

If, in the present state of circumstances, the grantee of this Faculty, or his successors in the mansion to which it is, in fact, attached, were hereafter, either perhaps on account of their having ceased to be Members of the Church, or on account of some quarrel with the Incumbent, or for any other motive, to cause a service different from that which is enjoined in the Prayer Book to be read over the corpse, or if they were to place the body in the vault with-

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out previous performance over it of any religious service, in any case of this kind the present or future Ordinary might be considerably embarrassed in the exercise of his proper jurisdiction to remove the scandal, or to punish the authors of it.

Their Lordships think that it is the duty of the Ordinary, when granting a *privilegium* of this kind, to take every precaution in his power against the possibility of a misuse by the grantee or his representative of the special favour which is conceded to him. They see no reason why the grant of this Faculty to Mr. *Kingsmill* should not be made conditional upon his consenting to allow a sufficient piece of ground, near the aperture to the vault, to be first duly consecrated for the sole and special purpose of burials in this vault. The jurisdiction of the Ordinary, *ratione loci*, would then be unquestionable; and any impropriety with relation to the performance of the burial service would be subject to his correction and control.

Their Lordships, therefore, think that this cause should be remitted to the Court of Arches, with directions to issue the Faculty in question whenever it has been duly certified to that Court that the consecration of the additional portion of ground has taken place; and with power, if it should be deemed necessary, to vary the terms of the Faculty by a reference to a recital of the fact of such consecration having been effected.

Their Lordships think that both parties ought to bear their own costs incurred in this Court and in the Court of Arches.

Their Lordships will humbly advise Her Majesty in accordance with the opinion which they have now expressed.

Proctor for the Appellant: *G. H. Brooks.*
Proctors for the Respondent: *Rothery & Co.*

ELIZABETH WEBSTER AND OTHERS . . . APPELLANTS;

AND

HERBERT POWER, GEORGE HENRY DAVENPORT, AND ROBERT BURKE . } RESPONDENTS.

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March 13.

ON APPEAL FROM THE SUPREME COURT AT VICTORIA, NEW SOUTH WALES.

Mortgage of Sheep—Increase—Substitution—Pleading—Fraud not charged.

13 Ch D 466
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Mortgage of a certain number of branded sheep and herds of cattle on a Run in the Colony of *New South Wales*, with the issue, increase, and produce thereof, held limited to the issue and increase of such specific sheep, and not to include any sheep afterwards brought upon the Run, though in substitution of those specified in the original mortgage.

Semble, fraud not specifically charged by the Bill cannot be relied on as a ground of relief in a Court of Equity.

THIS was an appeal from an Order or decree of the Supreme Court at *Victoria*, sitting as the Court of appeal in Equity, which affirmed a previous Order or decree made by Mr. Justice *Molesworth* in a suit in which the Appellants were Plaintiffs, and the Respondents, Defendants.

The Bill was filed by the Appellants, in their character of Executrix and Executors of one *James Webster*, late of *Mount Shadwell*, in the Colony of *Victoria*, against the Respondents. The Bill stated, that by an Indenture of Mortgage, dated the 1st of December, 1853, made by the Defendant, *Burke*, of the one part, and *Webster* of the other part, certain flocks of sheep amounting in number to about 15,000, and branded "B," and herds of cattle amounting to about 2,000 head, then depasturing upon a Station known as *Mount Shadwell* Station, in the County of *Hampden*, in the *Portland Bay* Dsitrict, together with the issue, increase, and produce of such sheep and cattle respectively, were assigned unto *Webster*, his Executors, Administrators, and assigns, by way of mortgage, to secure the sum of £18,560, already secured

* *Present:*—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT).

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by certain Bills of Exchange for the sums of £6,613. 6*s.* 8*d.*, £6,186. 13*s.* 4*d.*, and £5,760, respectively, at the times and in the instalments in the Indenture mentioned, and that such Indenture of Mortgage was registered on the 3rd of February, 1855. That the Defendant, *Burke*, paid the two sums of £6,613. 6*s.* 8*d.*, and £6,186. 13*s.* 4*d.*, and by a Memorandum of Agreement, dated the 21st of September, 1857, made between *Webster* of the one part and the Defendant, *Burke*, of the other part, *Webster* agreed to extend the term for the payment by *Burke* of his Bill for £5,760, secured by the mortgage of the stock on the *Mount Shadwell* Station, and to receive payment thereof by three equal payments on the 1st of December in each of the years 1858, 1859, and 1860, together with interest thereon, at the rate of £10 per cent. per annum, and in consideration of such extension *Burke* agreed that the above sums and interest should, on the demand of *Webster*, his Executors, Administrators, or assigns, be secured by a fresh deed of Mortgage by *Burke* of 10,000 sheep, and 1,000 head of cattle, if there were any doubt of the then present Mortgage being a valid security. That before signing such Agreement, *Burke* remained in possession of the Station and sheep, and by means of the increase, which were always branded "B," kept up the original number of stock until the end of the year 1857, when, in accordance with the Agreement, he reduced the stock to the number of 10,000 sheep, or thereabouts, and 1,000 head of cattle. That in the month of July, 1861, the Defendant, *Burke*, being indebted to the other Defendants, *Power* and *Davenport*, to a considerable amount, by an Indenture of Mortgage, dated the 15th of July, 1861, made between *Burke* of the one part, and *Power* and *Davenport*, representing the Firm of "*Power, Rutherford, & Co.*," of the other part, all the flocks of sheep of the Defendant, *Burke*, amounting in number to 10,000, and branded "B," and depasturing upon the *Mount Shadwell* Station, were assigned unto *Power* and *Davenport*, their Executors, Administrators, and assigns (but subject and without prejudice to the Mortgage of the 1st of December, 1853), by way of mortgage, to secure the payment of £4,330, and other moneys amounting to the sum of £2,117. 10*s.*, and such mortgage was registered on the 16th of July, 1861. That shortly after the execution of the last-mentioned Mortgage, the Defendants, *Power, Rutherford,*

& Co., sent a notice, dated the 28th of August, 1861, to the Executors of *Webster*, setting forth the last-mentioned Mortgage of the 15th of July, 1861, of the flocks of sheep of the Defendant, *Burke*, of different sexes and ages, amounting to 10,000, or thereabouts, branded respectively with the mark or letter "B," depasturing and being at or upon *Mount Shadwell* Station, which were thereby assigned and transferred unto the Defendants, *Power* and *Davenport*, their Executors, Administrators, and assigns (subject and without prejudice to the Mortgage of the 1st of December, 1853, made between the Defendant, *Burke*, of the one part, and *Webster* of the other part), for securing the payment of a Bill of Exchange for the sum of £4,330, and other moneys, amounting to the sum of £2,117. 10*s*., by certain instalments, together with interest, as therein mentioned; and also all other sums of money which the Defendants, *Power* and *Davenport*, or the survivor of them, or the Executors or Administrators of such survivor, their or his assigns, might, since the making of a certain advance therein mentioned, have lent, or which might thereafter be lent, to or on the account of *Burke*, his Executors or Administrators, or might thereafter be owing from them or him to the Mortgagees, or the survivor of them, or the Executors or Administrators of such survivor, on any account whatsoever, including interest. That by an Indenture, dated the 8th of April, 1862, made between the Defendant, *Burke*, of the one part, and Defendants, *Power* and *Davenport*, of the other part, after reciting the Indenture of the 15th of July, 1861, and that the Mortgagor had, with the consent of the Mortgagees, sold 4,370 of the sheep in the Indenture comprised, and had purchased 6,410 other sheep or thereabouts, which 6,410 sheep were branded "B," and were substituted for the 4,370 sheep so sold as aforesaid, as security for the money so owing to the Mortgagees as aforesaid. That by divers payments made by *Burke* the debt of £5,760 had been considerably reduced, and that there was then due, in respect of the Mortgage debt, the sum of £1,353 only, together with arrears of interest. That *Webster* died on the 29th of March, 1859, having by his Will appointed the Appellants his Executrix and Executors. That on the 29th of September, 1863, the Defendants, *Power, Rutherford, & Co.*, in virtue of their Mortgage, took possession of all the sheep and

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cattle depasturing on the Station, and had either sold the same or retained them in their possession. That upon the Plaintiffs applying in the month of January, 1864, to *Burke* for the payment of the balance then due to their Testator, *Webster*, they were referred by him to the other Defendants, and the Plaintiffs accordingly applied to them for payment of the amount due, namely, £1,356. 13*s.* 4*d.* That *Power, Rutherford, & Co.*, by a letter, dated the 26th of January, 1864, in answer thereto, denied that they were in any way liable for *Burke's* payments, and stated that they held a Mortgage over some sheep on the *Mount Shadwell* property (leased to *Burke*), which were purchased by him from them and were then in their possession. That a further correspondence took place between the Plaintiffs' Solicitor and *Power, Rutherford, & Co.*, which resulted in the latter firm repudiating their liability to pay the Plaintiffs; and the Bill alleged that the Plaintiffs were entitled to the sum of £1,353, or what might be due to them in respect of the mortgage debt out of the proceeds of the sheep, if they had been sold by the Defendants, or to have the sheep sold, and the proceeds applied towards payment of that sum, or what might be due to them on their mortgage. That *Power, Rutherford, & Co.*, took their security subject to the Mortgage to *Webster* as aforesaid, and that the Defendants, *Power, Rutherford, & Co.*, held the sheep, or the proceeds of the sale thereof, as Trustees for the benefit of the Plaintiffs, to the extent of the money so due to them as aforesaid. That the Defendants, as Trustees and Mortgagees in possession, were bound, when they took possession of the sheep, to keep separate and distinct the sheep which Defendants admitted were or might have been subject to the Mortgage to their Testator from those which the Defendants claimed as not subject thereto, and that the Defendants were bound to ascertain which of the sheep were exclusively mortgaged to them, as they alleged, and were bound to keep distinct accounts of the proceeds of the sale of such sheep respectively and of the leasehold premises. That the Defendants had sold all the sheep and leasehold premises, but that such accounts had not been kept by the Defendants, and by reason of the confusion thereby created it was impossible for the Plaintiffs to distinguish which sheep were the subject of the Mortgage to their Testator, or what were the proceeds of the sheep re-

spectively and of the leasehold premises, and that such confusion had been brought about by the Defendants' own acts, and the Plaintiffs were entitled to have the whole quantity of sheep treated as security for their claim, and to be paid the full amount of money so due to them as aforesaid, or so far as the proceeds of the sheep and leasehold premises would extend, and the Bill prayed, that an account might be taken of what was due to the Plaintiffs in virtue of the Indenture of Mortgage of the 1st of December, 1853, and that the Defendants, *Power, Rutherford, & Co.*, might be ordered to pay what might be found due, together with the costs of suit, out of the moneys which had arisen from the sale of the sheep and leasehold premises, if the same had been sold; but if the sheep and leasehold premises had not been sold, then that the same might be sold under the directions of the Court, and that the moneys arising from such sale might be applied towards paying the Plaintiffs what might be found due to them. The Defendant, *Burke*, was not required to answer the Bill.

The Defendants, *Power* and *Davenport*, by their joint answer, in effect, admitted the above statements in the Bill; but alleged that at the time of taking possession of the sheep they were depasturing on lands which were leased to *Burke* by one *Manifold*, and that such Lease was deposited by *Burke* with them, by way of further security for their debt. They denied that the Indenture of the 8th of April, 1862, gave any interest or claim to *Webster*, or his Executors and Assigns, other than he was entitled to under the Indenture of the 1st of December, 1853, and alleged that *Burke* had, previously to the date of the Indenture of the 8th of April, 1862, purchased and brought on the Station 7,530 sheep, and not 6,410, as mentioned in the Bill, and had afterwards purchased and brought upon the Station additional sheep to the number of 3,605, which, they submitted, were not to be deemed comprised, nor were in fact comprised, in the security of the Plaintiffs, or, at all events, not so comprised in priority of the security held by the Defendants. They admitted having taken possession of sheep depasturing on the *Mount Shadwell* Station to the number of 12,000, and that a portion of such sheep, or their issue, were comprised in the Mortgage to *Webster* by *Burke* in the year 1853, but submitted that if any sheep were in fact sold by

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them which were the property of the Plaintiffs, as such Mortgagees, the proper remedy of the Plaintiffs was at law; and further submitted that the Plaintiffs had been guilty of delay and laches in the prosecution of their rights as such Mortgagees against the Defendant, *Burke;* that the Plaintiffs were bound to identify the sheep which they claimed, as such Mortgagees, with the sheep sold by them, and that any difficulty which might have arisen as to the identification of such sheep had been caused by the delay and negligence of the Plaintiffs; and, finally, that the Plaintiffs ought to be left to the prosecution of their legal rights, if any, and were not entitled to relief in a Court of Equity.

The cause came on for hearing on the 21st of October, 1864, before Mr. Justice *Molesworth*, when witnesses were examined on both sides, including *Burke*, the Mortgagor, and the Defendant, *Power*.

Mr. Justice *Molesworth*, in giving judgment, said:—"The Plaintiffs by their Bill prayed to have their debt ascertained and paid by the Defendants, *Power* and *Davenport*, out of the produce of all the sheep and leasehold sold, or if the sheep had not been sold, then to have them sold, and the proceeds similarly applied. The sheep which were in existence and comprised in the Mortgage of 1857, were probably all dead before September, 1863; but it has not been disputed in argument that the Plaintiffs' lien continued against so many of the sheep taken in September, 1863, as were the issue or progeny of those mortgaged in 1857. The Plaintiffs, however, insist that *Burke* tortuously intermixed the sheep comprised in the Mortgage to *Webster* with those otherwise brought upon the *Mount Shadwell* Station, and that the Defendants, *Power* and *Davenport*, should be held responsible for *Burke's* acts, and a legal principle should be applied to the case, namely, that a person mixing his own goods with those of another, so that the parts become mixed and undistinguishable, thereby loses his property in the entire mixture. But it does not appear to me that *Burke* on this subject should be considered the Agent of his second Mortgagees rather than of his first; *Webster*, in taking his Mortgage, introduces no stipulation as to distinguishing the mortgaged sheep, by brands or otherwise, from those afterwards introduced, and he and the Plaintiffs seem never to have taken any trouble on the subject. The Defendants, *Power* and *Davenport's* Firm, had appa-

rently no direct connection with the branding, but took a Mortgage of all branded 'B' prior to it. I do not think there is any such difference in their comparative neglect on the subject of distinguishing that a difference should be made unfavourable to the Defendants as to the mixture which *Burke* had made before September, 1863; besides, this doctrine of loss of property by intermixture savours of forfeiture, which Courts of Equity rather relieve against than assist. See *Colborn* v. *Simms* (1). Up to the possession taken in September, 1863, I do not think that the Court should have any leaning as between the Plaintiffs and the Defendants, *Power* and *Davenport*, but endeavour to ascertain their proportional interests in the sheep then taken by the latter, according to the proportion borne by the number of the sheep comprised in *Webster's* Mortgage to the number of those brought on otherwise, unless evidence was offered of some distinction in the quality of the different classes, which would render the adjustment by mere numerical proportion incorrect. From the taking possession in September, 1863, to the sale, I think the Defendants, *Power* and *Davenport*, stand in a more culpable position. Having full notice of the claim of the Plaintiffs, they do not inform them of the change of possession or the treatment of the sheep, and afterwards sold the sheep in one lot with a leasehold interest, so as to confound the numbers and price of different classes of sheep and the land. But their liability to the Plaintiffs, I think, was complete upon the seizure, and the intermixture had occurred before. As to their subsequent conduct, they should be dealt with according to a principle of evidence, that they who cause obscurity should have doubts disposed of unfavourably to them. It has been argued for those Defendants that the Plaintiffs' remedy should be at law; but I think that *Burke*, as Mortgagor in possession of the sheep, was a Trustee for *Webster*, his Mortgagee, and that the Defendants, taking a second Mortgage knowingly, and entering into possession, were similarly Trustees, so as to give an equitable jurisdiction. Besides, the ascertainment of the Plaintiffs' demand is a matter of account, and the determining the proportion of the sheep subject to the two Mortgages is a matter of account more conveniently adjusted in the Master's office than before a jury."

(1) 2 Hare, 554.

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By an Order of the Supreme Court, dated the 16th of February, 1865, it was ordered, that it be referred to the Master in Equity to take an account of the sums remaining due to the Plaintiffs by the Defendant, *Burke*, on the sum mentioned in the Memorandum of Agreement, bearing date the 21st of September, 1857, for principal and interest, and it was declared that the Plaintiffs had a lien for the same upon the sheep, of which the Defendants, *Power* and *Davenport*, or their firm, took possession in September, 1863, to the extent of the value of so many of the sheep as should be deemed probably the issue or increase of those depasturing on the *Mount Shadwell* Station, on the 1st of December, 1853; and the Court further ordered, that it be referred to the Master to inquire and report the number and the value of the sheep which should be so deemed issue and increase, with liberty to the Master to report specially on the matters referred to him, and the Court reserved the consideration of all further directions and costs.

The Appellants appealed to the full Court upon the following grounds:—First; that the Plaintiffs were entitled to a decree for the full amount of the principal and interest claimed by their Bill. Second; that the Defendants had notice of the rights of the Plaintiffs, and took their mortgage securities subject to such rights. Third; that the sheep, the subject of the Defendants' second mortgage, were substituted for the sheep which the Defendants had sold, and which they took subject to the Plaintiffs' prior rights. Fourth; that such substituted sheep were liable to the Plaintiffs' mortgage debt. Fifth; that the Defendants, by taking possession in September, 1863, and by their subsequent sale, created a confusion of the property, and as they could not then determine which sheep belonged exclusively to them or which did not, the Plaintiffs were entitled to be paid in full their principal, interest, and costs, out of the moneys produced by the sale. Sixth; that as the Plaintiffs sold the sheep and also the leasehold property together for a lump sum, they were unable to distinguish how much was paid for the sheep and how much was paid for the land, and, therefore, the Plaintiffs were entitled to be paid in full out of the proceeds of such sale. Seventh; that the Judge was wrong in saying that the Plaintiffs relied upon the confusion created by the Defendant, *Burke*, branding the new sheep the

same as the old, as the Plaintiffs did not make or allege any such case. And eighth; that the Judge was also wrong in deciding that the Plaintiffs were only entitled to such sheep as were the issue of those mortgaged in 1857, as the Plaintiffs were entitled to hold all the sheep taken by the Defendants subject to the mortgage of the Plaintiffs' Testator, and subsequently substituted for such as were sold as being subject to their Testator's security.

The appeal came on for hearing on the 1st of May, 1865, before the full Court, consisting of Sir *William Foster Stawell*, Chief Justice, Sir *Redmond Barry*, and *Edward Eyre Williams*, Esquire, two of the Puisne Judges, and by a decree made by the Supreme Court, dated the 18th of May, 1865, the decree of Mr. Justice *Molesworth* was affirmed, and the appeal dismissed with costs. Hence the present appeal.

Mr. *Druce*, Q.C., and Mr. *Edmund F. Moore*, for the Appellants:—

The decree or order of the Supreme Court referring it to the Master to take an account of what was due under the memorandum of agreement of the 21st of September, 1857, for principal and interest; and declaring that the Appellants had a lien only on such of the sheep taken possession of by the Respondents as were probably the issue or increase of those originally mortgaged in 1853, is erroneous and cannot stand. It is contrary to the principles of Equity as prevailing in the Supreme Court in the Colony. The Appellants were entitled to a decree for the full amount of principal and interest claimed by the Bill. The case is one of substitution or confusion, created and alone occasioned by the act of the Respondents, who were second Mortgagees with full notice of the prior claim of the Appellants. The decree ought at least to have referred to the time when the substitution was made and the confusion and commixture took place: *Lupton* v. *White* (1); *Gray* v. *Haig* (2); *The Duke of Leeds* v. *The Earl of Amhurst* (3); *Fellows* v. *Mitchell* (4); *Stock* v. *Stock* (5). All these authorities shew that, whether in Equity or at Common law, those who by their acts

(1) 15 Ves. 432.
(2) 20 Beav. 219.
(3) 20 Beav. 239.
(4) 2 Vern. 516.
(5) Popham, 38.

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create the confusion are answerable for the injuries resulting from it. Now, we contend that the sheep, the subject of the Respondents' second mortgage, were substituted for those which they had sold, and which they took subject to *Webster's* prior debt, and that such substituted sheep were liable to his mortgage debt: *Holroyd* v. *Marshall* (1). The confusion occasioned by the Respondents taking possession in 1863, and the subsequent sale, make it impossible to ascertain which sheep now on the Station belong to them or which do not, and the *onus probandi* in such circumstances lies on the Respondents to identify the sheep sold, and their issue, from those originally mortgaged to *Webster* by *Burke*. In consequence of the confusion thus occasioned by the Respondents' dealings, which were equivalent to fraud, the Appellants were entitled to be paid the full amount of the principal and interest due to them on their mortgage out of the moneys produced by the sale as well of the sheep as the leasehold premises which the mortgage gave them: *Hicks* v. *Hastings* (2). The sheep and leasehold property having been sold together for a lump sum, there is no means of ascertaining how much was paid for the sheep, and how much for the land, and, therefore, the Appellants were entitled to a decree for the full sum due to them, out of the proceeds of such sale. The original mortgage was of sheep branded "B" and their issue and increase; the substituted sheep were branded with the same mark "B," and there is no means of ascertaining or identifying the increase or issue of those originally on the Station, as directed by the decree of the Supreme Court; in such circumstances the substituted sheep must be taken to be the issue and increase of the original flock. If there is confusion, it is by the acts of the Respondents, and they must take the consequences. The Court below has directed an inquiry as regards the Appellants' claim, for which the evidence requisite has been, by the commixture and substitution of the flock by the Respondents, destroyed.

Sir *R. Palmer*, Q.C., and Mr. *Everitt*, for the Respondents, *Power* and *Davenport*:—

This is neither a case of confusion or substitution. It is not so stated or alleged in the pleadings, nor is it pretended by the Bill,

(1) 10 H. L. C. 191. 9 Jur. N.S. 213. (2) 3 K. & J. 701.

that there has been any fraudulent dealing as regards the sheep, either prior or subsequent to the Respondents' possession of them. The charge of fraudulent dealing is an after thought, made now for the first time, and it would be against every principle of justice, as well as contrary to the ordinary practice of Courts of Equity, to allow a charge of fraud to be argued and urged as a ground for relief which is not stated on the pleadings, and was not argued in the Court below: *Wilde* v. *Gibson* (1); *The New Brunswick and Canada Railway Company* v. *Conybeare* (2). The confusion, if any, was occasioned by the neglect of the Appellants, not by anything done by or on the part of the Respondents. The Appellants' original securities extended only to the sheep on *Mount Shadwell* Station at the date of such securities; and to their issue and increase, that is, the progeny of such sheep. Those securities did not, and could not, by their terms include after-purchased sheep, which were exclusively the subject of the Respondents' Mortgage. No fiduciary relation existed, nor was any such created by the Respondents' dealings, as between them and the Appellants, which could support or warrant the relief prayed for: *Rowley* v. *Adams* (3). If the Appellants had any right it was at law, and by electing to proceed in Equity, instead of at law, they precluded their claim, if they had any, for damages. The only relief that could be given them in Equity was that decreed by the reference to the Master to ascertain which of the sheep originally mortgaged, or their issue, remained on the Station, and which alone were liable to the Appellants' claims. With regard to the claim made to the lease of the Run granted by *Manifold*, and deposited with the Respondents as an equitable Mortgage, the Appellants are not entitled to such lease, or to any benefit arising from it: it was no part of the original contract between the parties that the Mortgage should include any after-acquired lease of the Run.

SIR JAMES W. COLVILE:—

This is an appeal from a decree of a single Judge of the Supreme Court of the Colony of *Victoria*, which was confirmed on appeal by the full Court.

(1) 1 H. L. C. 605. (2) 9 H. L. C. 711 & 724. (3) 2 H. L. C. 725.

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The first question which suggests itself to their Lordships' consideration is:—What was included in the Plaintiffs' original Mortgage? It was admitted at the Bar that the answer to be given to the question whether the Mortgage included any sheep brought upon the Run which were not the issue of those that were on the Run at the date of the Mortgage, if considered with reference to the mere words of that instrument, must depend upon the construction which their Lordships put upon the word "increase." Their Lordships, looking at the deed, and seeing that "increase" is always spoken of as the increase, not of a flock, but as the increase of those sheep which were originally the subject of the Mortgage, are clearly of opinion, that it must be taken to mean the natural increase, or the offspring of those original sheep.

The second question is, whether that Mortgage has created any lien or interest in the Plaintiffs upon the leasehold property which was part of the subjects that were ultimately sold by the Respondents; and their Lordships are unable to find in that deed anything which can fairly be said to have that effect. There is undoubtedly a covenant in the deed which contemplates a possible lease, but the lease spoken of is clearly a lease which, under certain regulations then issued for this Colony, it was supposed might be granted by the Government in substitution for the licence under which the Run had previously been held. There is nothing in those words which can be taken to give the Plaintiffs an equity to a lien attaching upon a lease derived by some other title, as this particular lease seems to have been. And if it were otherwise, there would be very considerable difficulty in administering that equity upon a Bill framed as this is, because it clearly appears on the evidence,—in fact, it was admitted at the Bar,—that when that particular lease was obtained from Mr. *Manifold* the parties immediately proceeded to give the Respondents an equitable Mortgage by deposit of it. If, therefore, it was the intention of the Plaintiffs to question that transaction, and to assert in themselves a prior incumbrance upon that lease, it was their duty to state such a case, to raise it by the Bill, and to put it properly in issue. But the Bill is wholly silent upon that point.

The third point to be considered is, whether, independently of the words of the original Mortgage, this Court, sitting as a Court of

Equity, has any grounds upon which to hold that the sheep which were "substituted," according to the term used in the deed, for those which were sold in 1862, are subject to the Plaintiffs' Mortgage.

Their Lordships are clearly of opinion, and they entirely agree with Sir *Roundell Palmer* in saying, that, emphatically in a case which involves an imputation of personal fraud, and in any case in which it is sought to raise a personal equity, upon certain facts, against the Defendant, it is the duty of the Pleader who prepares the Bill to state those facts, to shew his equity, and to put the point fairly in issue. It does not appear to their Lordships that any such case as was made at the Bar to-day has been properly raised by the Bill before them.

That seems also to have been the view taken in the Court below; in fact, upon these proceedings it would appear, that in the first Court,—the Court of First Instance,—the case was not raised at all. It seems to have been raised by the grounds of the appeal, and is dealt with by the Judges of the Superior Court.

The result, therefore, of these findings is to reduce the Appellants' claim to a lien on the issue or increase of the sheep originally included in his security, and the proceeds realized by the sale of them. Of course we assume that all the original sheep have died long ago.

To this extent his right is affirmed by the decree which is impeached by the appeal; and the only question that remains is, whether it was the duty of the Court to give an immediate decree for the sum claimed against the Respondents, presuming, by reason of the confusion or otherwise, that the proceeds of all the sheep that were sold were subject to the Plaintiffs' lien, or whether it was proper to direct an inquiry in order to ascertain what part of such proceeds was so subject.

With reference to this question of confusion, their Lordships think, upon the evidence, that it has not been established against the Respondents that they are responsible for any confusion which existed, or which had taken place before they took possession of the Run and flocks. And, upon the evidence, it also seems probable that whatever confusion has been occasioned by the intermixture of the flocks had then taken place.

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If any difficulty has arisen as to ascertaining the rights of the parties under the inquiry directed, by reason of the sale of all the sheep to other Purchasers without any attempt on the part of the Respondents to discriminate between them, or by any other act or omission for which they are responsible, the question, what presumptions ought to be drawn against the Respondents in consequence of the difficulty so caused by them, is one which, as it appears to their Lordships, will properly arise upon further directions, and after the Master has made his report. It possibly will arise before the Master in making the inquiry directed, if he shall think it his duty to draw any such presumptions. In that case his conclusions will be, of course, subject to appeal before the Court, when the case comes before it upon further directions. But it seems to their Lordships to be altogether premature to assume that the Master will not be able to come to a conclusion upon the matter referred to him by means of direct evidence.

With respect to what has been said as to the introduction of the word "probable," into the decree, it does not appear to their Lordships that that affords any ground for varying the decree. In fact, if the word introduces any fresh element into the inquiry, it is an element which seems to be rather in favour of the Appellants than in favour of the Respondents.

Upon the whole, their Lordships feel that it will be their duty humbly to recommend Her Majesty to affirm the decree of the Courts below, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Hancock, Sharp, & Hales.*
Solicitor for the Respondents: *W. S. Paine.*

ROBERT MARSDEN FITZGERALD . . . APPELLANT;

AND

CHARLOTTE FITZGERALD . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Annuity—Deed of Covenant—Marriage of Covenantor with Annuitant—Suspension—Extinguishment—Recovery of arrears subsequent to death of Husband.

A man by deed covenants to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation. The covenantor afterwards marries the annuitant, and dies leaving her surviving:—

Held, affirming the judgment of the Court below, that the annuity is not extinguished but only suspended by the marriage, and that the Widow is entitled to recover arrears accrued subsequent to the death of her husband.

THIS was an action brought by the Respondent against the Appellant to recover arrears of annuity from the Defendant as Executor of the Testator due to the Respondent.

The declaration alleged that by a deed, dated the 18th of May, 1864, the Testator covenanted and agreed that he would yearly and every year during the natural life of the Respondent pay an annuity of £100 by two half-yearly payments in advance, on the 1st day of July, and the 1st day of January in every year, to the Respondent, whether covert or sole, for her sole and separate use and benefit and disposition during her life, independent of any future husband, and so that she might not, whether covert or sole, at any time or times whatsoever, make any assignment or disposition by way of anticipation of the said annuity, or any part thereof, to the intent that the same might not be subject or liable to the debts of any future husband of the Respondent, but always remain for her sole and separate use, and independent maintenance and support; and it was further declared, that the receipts of the Respondent alone for the an-

* *Present*:—SIR WILLIAM ERLE, LORD JUSTICE WOOD, LORD JUSTICE SELWYN, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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nuity, or any part thereof, to be paid in the manner aforesaid, should, notwithstanding her coverture (if married), be a sufficient release and discharge for the same; provided always, that if the Respondent should go to reside out of the City of *Sydney* without the consent in writing of the Testator during his life first had and obtained, or should marry without the like consent first obtained, or should cohabit with any man or men, then upon the happening of either of those events, the deed and everything therein contained should absolutely cease and be void, and the annuity should thenceforth cease; and by the deed the Respondent, in consideration of the covenant on the part of the Testator, covenanted with the Testator, his Executors, and Administrators, that she would thenceforth reside and continue in the City of *Sydney*, and would not quit the same without the consent in writing of the Testator first obtained; and further, that before contracting any marriage she would obtain the like consent. The declaration further alleged, that although the Respondent had done all things, and all things had happened to entitle the Respondent to receive the annuity, and although certain arrears of the annuity accrued due since the death of the Testator, the Appellant had not paid the same.

The Appellant by his plea alleged, that after the execution of the Deed, mentioned in the declaration, by the Testator, a marriage had been solemnized between the Testator and the Respondent, and the Testator and the Respondent thereupon became and were man and wife.

To this plea there was a demurrer, and a joinder in demurrer. The ground of the demurrer being, that the right of the Respondent to sue on the covenant of the Testator contained in the Deed was suspended only during coverture, and, therefore, that the plea was no bar to an action for arrears of the annuity which had accrued since the death of the Testator.

The demurrer was argued, and judgment given on the 5th December, 1866. The Court, consisting of the Chief Justice, Sir *Alfred Stephen*, Mr. Justice *Hargrave*, and Mr. Justice *Cheeke*, were unanimously of opinion that the plea was bad, and judgment was given in favour of the Respondent.

The appeal was from this judgment.

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Mr. *R. E. Turner* (Mr. *Coleridge*, Q.C., with him), for the Appellant:—

The question raised on this appeal is, whether when a man by Deed covenants with a woman to pay her an annuity for her life, for her sole and separate use, without power of anticipation, and afterwards marries her, the effect of the marriage is to destroy the covenant and extinguish the liability altogether, or only put an end to the obligation during the coverture, so that upon his death leaving the covenantee him surviving, the obligation is still in force for the remainder of her life. We contend that the covenant to pay the annuity was not merely suspended during the coverture, but became absolutely inoperative and extinguished by the marriage of the covenantor with the covenantee, such marriage being a release in law of the covenant, and of the annuity. The learned Judges of the Court below were of opinion, that the annuity being secured for the Respondent's separate use, and against anticipation, such clauses ought to be maintained against infringements, precisely as in a marriage settlement, and they thought that the case of *Gage* v. *Acton* (1), where it was held, in an action on a Bond to pay money after marriage between obligor and obligee, the debt was only suspended during marriage; and *Co. Litt*, 264 (b), were authorities in support of the demurrer. In *Milbourn* v. *Ewart* (2), a Bond conditioned for payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, was held not to be released by their marriage. There, as in this case, the marriage was pleaded in bar to an action of debt on the Bond against the heir of the obligor, and it was determined, that if the replication had stated the purposes for which the Bond was made it was good, being consistent with the Bond and condition. So in the more recent case of *Hore* v. *Becher* (3), where a single woman, being entitled to an annuity secured by Bond, married; the Husband executed a release of the annuity, and died, leaving his Wife surviving, and it was held that as he could release the security, he could release the annuity so as to bind his Wife. It is true that in the case of *Thompson* v.

(1) 1 Salk. 325-7; S. C. 1 Ld. Raym. 522.
(2) 5 T. Rep. 381-7.
(3) 12 Sim. 465.

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Butler (1) it was held that if a married woman had an annuity for life, a release by her husband did not bind her; but it does not appear from the report of that case how the annuity was secured, whether on land or personalty; if on land, it is quite clear it could not be released without her concurrence. *Ford* v. *Beech* (2) was an action of assumpsit by the payee of promissory notes against the maker. The Defendant pleaded in bar that, after the notes became due, it was mutually agreed by Defendant and another that a certain sum should be paid the Plaintiff, and as long as it was paid the right of action should be suspended. The Court of Exchequer Chamber held, that the plea was no answer, inasmuch as if the Plaintiff was barred his action on the notes, his right of action would by law be extinguished altogether. On the whole, we rely on the authority of Lord *Coke*, who says: "If a feme obligee take the obligor to husband, this is a release:" *Co. Litt.* 264 (b); and the principles of law enunciated by him in *Lampet's Case* (3).

Mr. *Mellish*, Q.C., and Mr. *Wills*, appeared for the Respondent, but were not called on.

LORD JUSTICE WOOD:—

Their Lordships do not think it necessary to call on the Counsel for the Respondent, as they are quite satisfied on the point.

The action was brought to recover arrears of an annuity granted by a Deed of covenant by a man to a woman, for her separate use, whom he afterwards married, and which arrears had accrued since the death of the Husband. The marriage was pleaded in bar to the action, on the ground that such marriage by putting an end to the obligation during coverture, destroyed the covenant and extinguished the liability altogether. To this plea the Respondent (the Plaintiff in the Court below) demurred, the ground of demurrer being, that the right of the Respondent to sue on the covenant was suspended only during coverture, and, therefore, that the plea was no bar to an action for arrears of the annuity which had accrued since the death of the covenantor.

(1) Moore's Rep. 522. (2) 11 Q. B. 852.
(3) 10 Co. Rep. 46, 51.

The question here arises upon a Deed of covenant, not upon a Bond with a simple defeazance, as in some of the cases cited. The Deed, moreover, provides that the annuity shall be payable half-yearly, not to be anticipated by her, and for her separate use if she married. The case of the Plaintiff is at least as strong as that of the widow in *Gage* v. *Acton* (1), upon which the Court below relied. That case was much controverted in *Milbourn* v. *Ewart* (2), and was there alleged by Counsel to have proceeded on a confusion of legal and equitable principles, and even to have gone beyond that relief which a Court of Equity would have accorded to the obligee. But Lord *Kenyon* and the other Judges upheld *Gage* v. *Acton* in the strongest terms, and Mr. Justice *Buller* referred to a case of *Foord* v. *Foord* (3), where Lord *Mansfield* had, notwithstanding the marriage of the obligee with the obligor, held a Bond to be subsisting at law after the coverture had determined. The case here is that of a covenant, and there is a fresh breach on each default. The Widow sues on those breaches only which have occurred since her Husband's death.

The case of *Hore* v. *Becher* (4), relied upon by the Appellant can scarcely be reconciled with the doctrines of a Court of Equity, as to the inalienable character of a wife's reversionary interest.

We are of opinion that the judgment of the Court below was right, and, therefore, that we must dismiss this appeal with costs.

Solicitors for the Appellant: *Davidson, Carr, & Bannister.*
Solicitors for the Respondent: *Sharpe, Parkers, & Jackson.*

(1) 1 Salk. 326.
(2) 5 T. Rep. 381.
(3) 5 T. Rep. 386.
(4) 12 Sim. 465.

J. C.* 1868 June 16.

In re AUGUSTUS STEWART, an Attorney and Proctor.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE IN BENGAL.

Professional misconduct—Attorney struck off the Rolls for false recitals in Deed, no fraud being intended or effected, restored on appeal—Construction—Indian Penal Code, sect. 423.

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By an Order of the High Court of Judicature in *Bengal* an Attorney and Proctor of that Court was struck off the Rolls for inserting in a Deed of Conveyance a false recital as to the consideration-money, knowing the same to be false, and for attesting the execution of the Deed, and signing his name as a witness to the receipt of the consideration-money, knowing that no such consideration had passed, or was intended to pass. Such Order, on appeal, discharged, the Judicial Committee being of opinion, that although the preparation of such a Deed, and the knowledge of such facts, would be circumstances of great weight against an Attorney cognizant of them in the event of such a Deed, upon or soon after its execution, being used as an instrument of fraud, yet, as the circumstances of its preparation were capable of being explained, and no fraudulent use of the Instrument had been made or attempted, no fraudulent motive alleged, and no injury directly or indirectly occasioned by it, the mis-statement upon the face of such a Deed could not be considered sufficient in itself to warrant the striking an Attorney off the Rolls of the Court :—

Semble, the provisions of sect. 423 of the *Indian Penal Code* in respect to the execution of such a deed are confined to "fraudulent and dishonest" participation in such an Instrument.

THIS appeal was brought against an Order made by the High Court at *Fort William*, in its original jurisdiction, dated the 6th of May, 1867, whereby it was ordered that the Appellant should be struck off the Roll of Attorneys and Proctors of that Court. The Order was made by a majority of the Division Court, consisting of the Chief Justice (Sir *Barnes Peacock*) and Mr. Justice *Phear*, Mr. Justice *Norman* dissenting.

The circumstances under which the Order was made were as follows:—

There were three brothers, *Augustus Stewart*, *William Molloy Stewart*, and *James Augustus Stewart*. The first of these was the Appellant; and his brother, *W. Molloy Stewart*, having purchased

* *Present:*—Sir William Erle, Lord Justice Wood, Lord Justice Selwyn, Sir James William Colvile, Sir Edward Vaughan Williams, and Sir Lawrence Peel.

for him a share in the business of *Charles William Hatch*, an Attorney, in *Calcutta*, the Appellant became, in July, 1862, a partner with *Hatch*. *W. Molloy Stewart* was an Indigo Planter, and in 1861 he established in *Tirhoot* an Indigo Factory called the "*Begum Serai Factory*," of which he was the sole owner. *James Augustus Stewart* had, in 1860, become an Attorney of the Supreme Court in *Calcutta*, and was employed in the office of Messrs. *Molloy & Dallas*, Attorneys there; but in March, 1862, he, at his brother *William's* request, went to *Begum Serai* with the view of assisting him. In October, 1862, Mr. *Francis Barrow*, a partner in the firm of *Barrow & Sen*, Attorneys, in *Calcutta*, requested *James Augustus Stewart* to join him as a partner, and, as an inducement, held out very advantageous terms to him. Upon *W. Molloy Stewart's* hearing of this, he requested his brother, instead of accepting *Barrow's* offer, to remain as his Manager, and, as an inducement to do so, he offered him a four-anna share in his Indigo concern, which he valued at Rs.32,000. At that time the property was wholly unincumbered, save an equitable mortgage to an Indigo Broker's firm, named *Thomas & Co.*, for the outlay only of the Factory for the expenses of the current season. The season's accounts were made up to the 20th of February, 1863, at which time the crop of season 1861-62 was sold, and resulted in a balance in favour of *W. Molloy Stewart* of Rs.24,544. 6. 2. This balance was carried on in the Books of *Thomas & Co.* as a credit in respect of the expenses for the cultivation of the year 1862-63, which season commenced in November, 1862. The Indigo was sold in February, 1863, and in consequence of such sale taking place *W. Molloy Stewart* came to *Calcutta* in that month. He then gave instructions to the Appellant to prepare a conveyance to his brother *James* in accordance with the arrangement entered into in October. The Appellant was aware of this arrangement, but he was instructed by his brother, *W. Molloy Stewart*, to state as the consideration passing from *James* to him the sum of Rs.32,000, instead of stating the real circumstances under which the Factory was conveyed. The reason that *W. Molloy Stewart* gave was, that as the Factory was a new one he was desirous in parting with a portion of the Factory to put a money value on it, and he valued the whole of the Factory at

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Rs.128,000. The Appellant, believing that to be a fair value, and that *W. Molloy Stewart's* circumstances were in a prosperous condition, and never having the slightest idea that *W. Molloy Stewart* intended, or himself contemplating, any fraud whatsoever, prepared a deed of conveyance from *W. Molloy Stewart* to *James Augustus Stewart*, dated the 16th of February, 1863, in which no mention was made of the arrangement under which *William* conveyed a quarter of his Factory to *James*, but it was drawn up and executed as if *James* had bought and paid for the share by a payment of Rs.32,000, and a receipt clause for the money was indorsed and signed by *W. Molloy Stewart*. The execution of the Deed and signature to the receipt clause were attested by the Appellant and two other witnesses, and the Deed was duly registered. No concealment was made of the fact of this conveyance, and *W. Molloy Stewart* having borrowed a sum of Rs.14,000 from *C. W. Hatch*, arrangements were made for giving security for that sum, and also for the sum of Rs.6000, which *W. Molloy Stewart* owed *Hatch* for the purchase-money of the Appellant's share in *Hatch's* business, by a mortgage over the Factory. The mortgage was originally prepared so as to comprise the whole Factory, and a draft was prepared, making the two brothers, *W. Molloy* and *James*, join as Mortgagors, but it being represented to *Hatch* that *William's* three-fourths of the Factory was a sufficient security, and he, knowing that the debt was one owing by *William* alone, took the mortgage as one of *W. Molloy Stewart's* three-fourths only. In May, 1863, *W. Molloy Stewart* left the *Begum Serai Factory* in the management of his brother *James*, and went to a Factory called "*Japhaha*," sixty miles off, where he was engaged as Manager, on a salary and commission. He remained there until October, when he bought a half share in a Factory called "*Jeetwarpore*." For this purchase, which he made through his agents, Messrs. *Thomas & Co.*, from a Mr. *Beckwith*, he was to pay Rs.207,000, which sum he was to pay with interest at 10 per cent. per annum, and as security for the purchase-money he gave *Thomas & Co.* a mortgage over that moiety. While *James Stewart* remained Manager of *Begum Serai* the firm of *Thomas & Co.* carried on the Factory as Agents until their failure, when they had Rs.4,000 belonging to the Factory in their hands, and then the *Agra Bank* carried on the

Factory. No division of profits ever took place, *James Stewart* only drawing on *Thomas & Co.* to the extent of Rs.300 a month, the profits remaining at the credit of the Factory. It appeared that *Thomas & Co.* afterwards failed, and that the *Agra Bank* also failed in June, 1866.

W. Molloy Stewart, some time afterwards, filed his petition in the Court for the Relief of Insolvent Debtors, in *Calcutta*, and he attributed his insolvency to having lost by his purchase of the half share of *Jeetwarpore Factory*, and to his liabilities in respect of the *Tirhoot Indigo Company's* shares, transactions he had been concerned in.

On the 25th of March, 1867, the Official Assignee of the Insolvent Court at *Calcutta* obtained an Order—"In the matter of the petition of *W. Molloy Stewart*, &c.," calling on the Insolvent, together with *James Stewart*, *Samuel Price Griffiths*, *James Murdock*, *Richard Dodd*, *John Phillips Thomas*, *Charles William Hatch*, and the Appellant, to attend the Court for the purpose of being examined touching the estate and effects of the said Insolvent.

The examination took place before Mr. Justice *Phear* on the 13th of April, 1867, when the Insolvent, the Appellant, *James Stewart*, and *Charles William Hatch* were examined. This being simply an examination at the request of the Official Assignee, and not a sitting held for the hearing of the case of the Insolvent, with a view to ascertaining whether or no he was entitled to his discharge, no Order of the Insolvent Court was passed upon that evidence.

On the 18th of April, 1867, the Appellant was served with a rule, made by the High Court in its ordinary original civil jurisdiction, on the motion of the Advocate-General, calling on the Appellant to shew cause why he should not be struck off the Roll of Attorneys, or be otherwise punished according to law, for his misbehaviour in inserting in the Deed hereinbefore mentioned a false recital as to the consideration, knowing the same to be false, and in attesting the execution of the deed with such false recital, and also in signing his name as a witness to the receipt of consideration-money therein mentioned, knowing that no consideration had passed or was intended to pass.

This rule was drawn up on an affidavit of Mr. *Davis*, sworn on the 18th of April, and two exhibits thereto annexed, being the

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before-mentioned Deed of Conveyance from *W. M. Stewart* to *J. A. Stewart* of the 16th of February, 1863, and the original draft thereof, and the depositions of three of the parties examined at the sittings in the Insolvent Court. *Davis's* affidavit was made by him as Clerk of the Court, and stated that the Insolvent Court held the sitting above referred to; that the parties above mentioned were examined as witnesses; that their evidence was, at the request of the Official Assignee, taken down in writing; and that two exhibits annexed to his affidavit were produced, and spoken to by the several witnesses. The affidavit, however, omitted to state the fact of *James Augustus Stewart* having been examined, or that other exhibits were produced on that examination, viz. a mortgage by *William Molloy Stewart* to Mr. *Hatch*, and a draft of the same.

The Appellant shewed cause, and the rule came on for argument before the Chief Justice, Mr. Justice *Norman*, and Mr. Justice *Phear*, when the Appellant filed affidavits made by Mr. *Macleod*, Mr. *Barrow*, Mr. *James Stewart*, the Appellant, and the Insolvent, and to the latter affidavit was annexed a letter and account furnished by Messrs. *Thomas & Co.* There was no affidavit put in on the part of the Official Assignee, or any other person, in support of the rule, nor was any statement made that any one was misled or defrauded by the deed in question. No Counsel appeared, the Advocate-General having left it in the hands of the Court. Mr. Justice *Norman* was of opinion that the rule should be discharged, but the Chief Justice (Sir *Barnes Peacock*) and Mr. Justice *Phear* being of a contrary opinion, it was made absolute.

The Court gave judgment *seriatim*.

Mr. Justice *Phear*, in his judgment, after giving his reasons for disbelieving the evidence, as to the sole object of making the deed express a pecuniary instead of the real consideration, stated as follows:—"However, I do not agree with the learned Counsel for Mr. *Augustus Stewart*, Mr. *Doyne*, that in a case like this it is necessary for the Court to come to a definite conclusion that a specific fraudulent act has been committed, or was intended to be committed, at the time when the false statements were put in, and that these false statements were made with a view to its commission. I am of opinion that it is in the proper discretion of this

Court, whose duty it is to see that its Officers are, on the one hand, well protected in every reasonable exercise of their duty, whether they make a mistake in the exercise of that duty or not, and to take care, on the other, that the character of its Officers shall be above suspicion; that it is only a proper exercise of the discretion of this Court when a taint of fraud and misconduct so deeply tinctured as, to my mind, is that which proceeds from the acts of which Mr. *Augustus Stewart* has admitted himself guilty rests upon an Officer, to say that it then becomes incumbent upon that Officer to shew, not merely that it is not certain, after all, that the act was not an innocent one, rather than a fraud, but that he is bound to go further, and to shew convincingly that he was, in fact, acting innocently in the matter, and with no fraudulent motive or motives of misconduct. Our powers, under the Letters Patent of this Court, are very considerably different from those which vest in the Judges of the Superior Courts of *England*, and I think that if we see reasonable cause (even although such a cause may not, according to the reports of cases in *England*, have seemed as yet to have been judicially recognised by the Superior Courts of *Westminster* as a cause of punishment) to remove or to suspend from practice an Attorney of this Court, we are bound to do so."

The Chief Justice, after giving his reasons at length for believing that the Deed was a fraudulent deed, and that the evidence given was unworthy of belief, proceeded thus:—"Assuming, then, that the conveyance of the Factory was not a sale, or intended to operate as a *bonâ fide* transfer, and that the false recital was inserted for a dishonest purpose, is it possible to believe that Mr. *Augustus Stewart* was so innocent as to think that it was an honest transaction? According to his own shewing, he knew that the statements relating to the consideration and the receipt at the foot of the Deed were false, and he admits that it was arranged between him and the Insolvent that it should be prepared in that way, and that either he or the Insolvent suggested the consideration. The only explanation he gives is, that it was done to put a value on the Factory. If he believed that the transfer was in consideration of Mr. *James Stewart's* continuing to act as manager, it was his duty as a Solicitor, preparing the Deed, to take care that it should contain a covenant by Mr. *James Stewart* to continue to act as manager,

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so that Mr. *W. Molloy Stewart* might have some security for the consideration in respect of which he was to transfer the four-anna share to his brother. I do not believe that Mr. *Augustus Stewart* acted honestly or innocently in inserting in the Deed the false statements which are contained in it, and in attesting the execution of the Deed when he knew that the statements were false, together with the false receipt for the Rs.32,000. Mr. *Augustus Stewart* is an Attorney of this Court, and I cannot believe that any gentleman who has acted in that capacity for any time, or has even served his articles in this country, could fail to be aware of the numerous *Benamee* transactions and fraudulent deeds which are resorted to in this country for the purpose of fraud. He ought to have suspected, and must have suspected, that the false statements to be contained in the Deed and receipt were not intended for an honest purpose, even if they were not prepared in pursuance of his own advice. It is one of the crying evils against which we have to contend in the administration of justice in this country, that devices of all kinds are resorted to for the purpose of protecting men's property from their creditors. A suitor may prove his debt without difficulty, and obtain a decree for that debt; but it very frequently happens, that as soon as he obtains a decree, and seeks to execute it, his difficulties commence. No man can have had much experience in the administration of justice in this country, whether in *Calcutta*, or in the Courts in the *Mofussil* (and more particularly so in the *Mofussil*), without being fully aware of the fact, and of the difficulties which are put in the way of honest suitors, and of the litigation which is constantly rendered necessary by means of false claims, which are set up and supported by deeds and other documents containing false statements and recitals. Mr. *Augustus Stewart* must have known that he was not acting honestly in attesting a Deed with the knowledge that it contained falsehoods, such as those which were deliberately written in the Deed in question, and in preparing and attesting a receipt for a large sum of money, of which he knew that not a single farthing had been paid, or was ever intended to be paid. The Legislature has endeavoured to put a stop to devices of this nature, and has enacted, by sect. 423 of the Indian Penal Code, that whoever dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which

purports to transfer, or subject to any charge, any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer, or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both. It is, in my opinion, the bounden duty of this Court to co-operate, as far as it can, with the Legislature in endeavouring to put a stop to practices of this nature, and when they find one of their own officers, an Attorney of the Court, lending himself to the preparation of such a Deed as this, and not merely preparing it, but giving it the weight of his name as an attesting witness to the execution of it, to visit such Officer with the severest penalty."

Mr. Justice *Norman* stated:—"Now, in this case, it is indisputably proved, and has in fact been hardly contested by Mr. *Doyne*, but that Mr. *Augustus Stewart* has been guilty of a very great and serious irregularity and impropriety, which, whatever view we take of the motives which actuated him, would, in my opinion, justify the Court in visiting Mr. *Stewart* with severe penalties. But when the question is whether he shall be struck off the Roll, it is clear to my mind that there is a distinction which should never be forgotten or overlooked. The clearest distinction exists between cases where an Attorney misconducts himself for fraudulent purposes, and those where such misconduct or irregularity, however grave, is not committed with the intent of defrauding his client or injuring others. In the present case, the question we have to determine in deciding whether Mr. *Stewart's* name shall be removed from the Roll, is whether Mr. *Stewart* did combine or conspire with his brothers or either of them, for the purpose of enabling Mr. *W. Molloy Stewart* to defraud his creditors. That I apprehend is the real point that we have to consider, and it is the real question on which I must satisfy my mind before I can concur in saying that Mr. *Stewart's* name shall be removed from the Roll. I entirely agree in the soundness of the proposition of law stated in the case cited by Mr. *Doyne*, *Re Palmer* (1). In exercising our summary jurisdiction over Attorneys and other Officers of the Court, I wholly disclaim acting on mere suspicion, however strong; I should require posi-

(1) 4 Nev. & Man. 529.

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tive proof that the crime or offence had been committed before I would say that an Attorney's name should be removed from the Roll. I should require the fraud or the crime to be distinctly proved against him, as if he stood upon his trial at the bar of a Criminal Court for the offence." * * * Everything was done in an open and straightforward manner. I do not see why, in a conveyance from one brother to another, in consideration of the latter managing the Factory for the other, a false recital should have been inserted that the consideration was a money consideration. It seems to me that the Deed, on the face of it, would have been just as binding and safe if the true consideration had been inserted. If the facts be as I have supposed, the consideration could not have been misstated for the purpose of defrauding the creditors of Mr. *W. Molloy Stewart.* * * * I think that the false statement of the consideration was, in fact, not made with intent to injure or defraud anyone; and I say with still more confidence, that on the evidence before us, in my opinion, no such intent has been proved. I would, therefore, say that the name of Mr. *Augustus Stewart* ought not to be removed from the Roll."

The Appellant applied for leave to appeal to the full Court, but as the Court were of opinion that no appeal lay save to Her Majesty in Council, it was refused, whereupon the Appellant applied for and obtained leave to appeal to Her Majesty in Council.

Sir *R. Palmer,* Q.C., and Mr. *J. Bell,* for the Appellant:—

The transaction in this case was not such an offence as justified the extreme penalty inflicted — striking the Appellant off the Rolls. The conveyance which contained the misrecital was a family arrangement, carried out at the instance of *W. Molloy Stewart* himself, for the obvious and specific purpose of giving an estimated money value to the Factory; but the real consideration, the advancement and provision for his brother *James,* was a sufficiently good consideration, and but for the express wish of the parties, might have been stated, and would have made the Deed of Conveyance equally valid. The attestation and nominal receipt of the purchase-money were the natural incidents of the statement of a money consideration. There was neither concealment nor fraud attempted or required, the Deed was duly registered and

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open to the inspection of all the world. This is not such a case as would justify Courts in *England* striking an Attorney off the Rolls. In *Ex parte Bailey, In the Matter of Harper* (1), Lord *Tenterden* says, "The Court exercises jurisdiction over Attorneys, and that is to be exercised according to law and conscience, and not by any technical rules." There is no foundation for the assumption by the High Court that they have a greater authority than is possessed by the Courts in *England*. The High Court, created by Letters Patent of the 14th of May, 1862, has power only to remove Attorneys of that Court on reasonable cause. [SIR LAWRENCE PEEL:—The Judges of the High Court have the same authority as the Judges of the late Supreme Court had, which is not higher than the Court of Queen's Bench has.] The Court must have felt the difficulty, for the Chief Justice refers to the 423rd section of the Indian Penal Code, Act No. *XLV.* of 1860, as affecting the case, which has really no application to such a measure as was here resorted to, of striking an Attorney off the Rolls. There was neither fraud nor concealment in the case, no affidavit was made, and there is not a particle of evidence that any one was deceived or damaged by the erroneous recital, or the wrong statement of the consideration. At the time of the execution of the conveyance, and until the failure of the *Agra Bank*, *W. Molloy Stewart* was in perfectly solvent circumstances. The Appellant merely carried out the views and intentions of his Client, in a family arrangement, and had no interest himself either to conceal or disclose the real nature of the business. The evidence exonerates him from any fraudulent or improper motives. The two Judges who constituted the majority in the Court at the hearing, erroneously disregarded the testimony before them, and acted on presumptions which were unwarranted, and for which there was no foundation.

No party appeared in support of the Order of the High Court.

1868
July 2.

Judgment was reserved, and now delivered by

LORD JUSTICE WOOD:—

The Appellant in this case seeks to reverse an Order of the High Court of Judicature in *Bengal*, made on the 6th of May,

(1) 9 B. & C. 691.

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1867, whereby a rule *nisi* of the 18th of April, 1867, calling upon the Appellant to shew cause why his name should not be struck off the Roll of Attorneys and Proctors of the Court, was made absolute; and it was ordered that his name should be struck off accordingly. The charge alleged against him by the rule *nisi*, was that of misbehaviour in inserting in a Deed a false recital as to the consideration, knowing the same to be false, and in attesting the execution of the Deed with such false recital, and also in signing his name as a witness to the receipt of the consideration-money therein mentioned, knowing that no consideration had passed, or was intended to pass.

The Deed in question is dated the 16th of February, 1863, and purports to be an absolute conveyance by *W. Molloy Stewart* to *James Augustus Stewart*, of a four-anna, or quarterly, share in an Indigo Factory called *Begum Serai*, the property of *W. Molloy Stewart*, in consideration of Rs.32,000. A receipt for that sum is endorsed on the Deed, and signed by *William Molloy Stewart*, and the stamp affixed, and the covenants for title and further assurance are the same as would be found if the transaction had been that which the Deed represents. Its execution and the receipt of the money are both attested by the Appellant. It is admitted by the Appellant that the real transaction was of a different character, and the circumstances of the case are stated by him, and by the parties to the Deed, to have been as follows:—The parties to the Deed and the Appellant are brothers. *W. Molloy Stewart* was the owner of the Factory, and is alleged to have been in good credit at the time of the transaction. His brother, the Appellant, was an Attorney in partnership with Mr. *Hatch*; a share in that partnership had been purchased for him by his elder brother, *W. Molloy Stewart*. *James* had for some time assisted *William* in managing the Factory; he had, in 1860, been admitted an Attorney, and, about the time of the Deed being executed, had been offered a partnership in the firm of Messrs. *Barrow & Sen*, Attorneys at *Calcutta*. *William* was desirous of still retaining his brother's services, and induced him to give up the offer of Messrs. *Barrow & Sen*, by proposing to make over to him one quarter of the *Begum Serai Factory*. The assent of *James* to *William's* proposal formed the real consideration for the assignment made to him on the

16th of February: no money consideration whatever was paid by *James*.

Mr. *Barrow*, by his evidence, confirms the statement of this offer of partnership having been made by him to *James* in July, 1862, and of *James* declining it on the ground of "favourable arrangements having been made with his brother."

It does not appear that at the date of the Deed there was any charge on the Factory, beyond a deposit of title deeds with Messrs. *Thomas & Co.*, the agents to the Factory, for the current outlay, and a balance was in fact then due to the Factory on this account. The Deed was registered immediately upon its execution; and within a day or two afterwards *William* borrowed of Mr. *Hatch* the further sum of Rs.14,000, of which Rs.6,000 seem to have formed the consideration for the Appellant's share in the partnership, bought for him by *William*, and a mortgage was executed, the draft of which is produced, by which *William* mortgaged his twelve-anna, or three-quarter share only in the Factory. The deed of conveyance of the 16th of February did not take any notice of the equitable Mortgage to *Thomas & Co.*; the Mortgage to *Hatch* recites its existence.

After these transactions, *William* purchased another considerable Factory, and took shares in an Indigo Company, whither he went to reside: but *James* continued to superintend the *Begum Serai Factory*. It is not shewn that *William* was embarrassed till after the failure of the *Agra Bank* in June, 1866. *Thomas & Co.* also failed about that time; and towards the end of the same year *William* presented his Petition in the Insolvent Debtors' Court.

James in the meantime had continued to manage the Factory, and to draw a salary of Rs.300 a month; but he drew no sum as profits, nor was any division of profits made till after the insolvency of *William*, when *James* consigned his one-quarter share of produce to separate Agents.

On the 25th of March, 1867, the Official Assignee under the insolvency of *William* summoned the Appellant, and *James* and Mr. *Hatch*, to be examined before the Insolvent Court as to the Insolvents' estate; and on the 13th of April, 1867, they and the Insolvent were examined before Mr. Justice *Phear*, and specially interrogated as to the above transaction.

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On the 18th of April, 1867, the Appellant was served with the rule *nisi* of the High Court upon which the Order now appealed from is based, which was obtained on the motion of the Advocate-General. The rule purported to be drawn up upon reading the affidavit of Mr. *Davis,* Chief Clerk of the Insolvent Debtors' Court, and two exhibits, marked "A" and "B," and the examination of *William Molloy Stewart,* Mr. *Hatch,* and the Appellant, and the deed of conveyance of the 16th of January, 1863.

Mr. *Davis's* affidavit merely verified the proceedings before the Insolvent Debtors' Court and the exhibits "A" and "B." "A" appears to have been the deed of conveyance; "B" the Mortgage to Mr. *Hatch.*

On this rule having been served, the Appellant appeared and filed affidavits in opposition to making the rule absolute.

The affidavits were—First: An affidavit by Mr. *McLeod,* an owner of Factories in the *Tirhoot* district, which deposed to his having known for some years past that *James* was the owner of a quarter share in the Factory, and to his having always believed that it had been given to him by his brother *William;* second, an affidavit of Mr. *Barrow* verifying his offer of a share in his business to *James Stewart,* who had assigned, as a reason for declining it, that he had an offer of a favourable arrangement with his brother; third, fourth, and fifth, affidavits of the three brothers. Certain accounts of *Thomas & Co.* were produced shewing a balance of Rs.24,544. 6. 2. due to the Factory in February, 1863, over and above a sum exceeding Rs.2000 paid to *W. Molloy Stewart's* credit at his Bankers. An exhibit was also produced, being the draft of the Mortgage to *Hatch,* originally prepared as a Mortgage by the two brothers, *William* and *James,* of the whole Factory, and afterwards altered to a Mortgage of the twelve-anna, or three-quarter share of *William* only.

The Appellant states in his affidavit that the form in which the Deed was drawn was suggested by *W. Molloy Stuart,* who alleged as his sole motive for desiring it to be drawn as a sale for a money consideration, his wish to put a value on the Factory, the same being then a new one. The Appellant states that he was not aware of any other object; that he believed, and believes, it to be a fair estimate; that his brother *William* was not indebted beyond

Rs.20,000, and had, at the date of the Deed, property of a value far above the amount of his debts, as to which he states some particulars. He states the immediate registering of the deed—the Mortgage to *Hatch*—and says that, in preparing and attesting the execution of the Deed, and attesting the endorsed receipt, he had no fraudulent or dishonest intention of any kind whatever, and that nothing, either directly or indirectly, passed between him and his brother *William* to lead him to suppose that *William* contemplated, and he does not believe that he contemplated, any fraud directly or indirectly. *James*, in his affidavit, says that he was not aware of the form of the Deed till after its execution. In his examination before the Insolvent Court he had said he wrote a letter about it, and that he thought it would have been better if the consideration had appeared; that letter cannot be found. In his affidavit he denies all intention of fraud, and says he is *bonâ fide* owner of the property. *William* also, in his affidavit, denies all fraud, and makes a statement as to his estate which, if true, would shew him, at the date of the Deed, to have possessed considerable property, and both agree in stating the real consideration to have been the consent of *James* to give up the offer of Mr. *Barrow*, and to attend to the management of the Factory.

No evidence whatever was given impugning the statements contained in these affidavits. No evidence has been given of any person having been defrauded by any of the brothers, nor of any improper use of the Deed having been attempted. Nor does the Assignee in Insolvency make any complaint, or impugn the actual ownership of the property, to the extent of one-quarter, by *James*. The Deed was registered. *McLeod* speaks of the notoriety of the claim, at least of ownership, by *James;* and *Hatch* took a Mortgage of three-fourths on the footing of *James* being the owner of the other one-fourth within a day or two of the execution of the Deed of Conveyance.

Under these circumstances the Chief Justice and Mr. Justice *Phear* have thought that the Appellant ought to be struck off the Roll of Attorneys and Proctors of his Court. The Chief Justice, in the reasons which he assigned for this conclusion, states, "that the insertion of the recital and statement admitted to be false, and known by all parties to be false, and which might be used for the

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purpose of misleading others, was a very grave offence on the part of the Attorney. The offence is greatly aggravated if it is proved that the recital was inserted dishonestly, or in order that it might be used for a fraudulent or dishonest purpose if necessity should ever arise." And at a later part of his reasons the Chief Justice says, "I do not believe that Mr. *Augustus Stewart* acted honestly or innocently in inserting in the Deed the false statements which are contained in it, and in attesting the execution of the Deed, when he knew the statements were false, together with the false receipt for the Rs. 32,000." The Chief Justice cites also section 423 of the Indian Penal Code, which punishes with fine or imprisonment, or both, any one "who dishonestly or fraudulently signs, executes, or becomes a party to any Deed or Instrument which purports to transfer or charge property, and which contains any false statements relating to the consideration for such transfer or charge, or relating to the person for whose use it is really intended to operate."

Mr. Justice *Phear* in his reasons states "that the intentional statement of a falsehood in a solemn Deed taken by itself without explanation must be considered as a badge of fraud;" adding, "that it is of course possible to conceive cases in which the act should be unconnected with any fraudulent intention, but that if the person who has made such a statement relies on its having been done innocently, it is for him to prove it. That it betokens fraud until the contrary is shewn." And in a later passage he says, "that it is incumbent upon the Officer of the Court who has done such acts as the Appellant admits he has done, to shew not merely that it is not certain after all that the act was not an innocent one rather than a fraud; but that he is bound to go further, and shew convincingly that he was in fact acting innocently in the matter, and with no fraudulent motive or motives of misconduct." The learned Judge concludes by observing, that the High Court had the power, if they thought it reasonable to exercise it (even though such a cause might not, according to the reports of cases in *England*, have seemed as yet to have been judicially recognised by the Superior Courts of Westminster as a cause of punishment), to remove or suspend from practice an Attorney of the Court.

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Mr. Justice *Norman* concurred with the other learned Judges in thinking "that the Appellant had been guilty of a very great and serious irregularity and impropriety, which, whatever view were taken of the motives which actuated him, would justify the Court in visiting him with severe penalties." He conceived, however, that on a question of striking an Attorney off the Roll "the clearest distinction exists between cases where an Attorney misconducts himself for fraudulent purposes, and those where such misconduct or irregularity, however grave, is not committed with the intent of defrauding his client or injuring others." He further says, "I should require the fraud or the crime to be as distinctly proved against him as if he stood upon his trial at the bar of a Criminal Court for the offence." He finally came to the conclusion that the false statement was, in fact, not made with intent to injure or defraud any one, and with still more confidence that on the evidence no such intent had been proved; and he accordingly suggested suspension as an adequate punishment.

Their Lordships feel bound, on the consideration of the whole evidence before them, to come to the conclusion that the Order complained of ought to be discharged.

They are of opinion, that the preparation of the deed of conveyance containing an untrue statement of the transaction, and the attesting of the Deed, and of a receipt for consideration money which was never paid, would be circumstances of great, perhaps overpowering weight, as evidence of guilty connivance against a Solicitor, cognizant of the actual facts, in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud. They are further of opinion that any Solicitor may very properly be called upon by the Court before whom such a Deed shall have been produced, to explain the circumstances attending its preparation and execution. But if this explanation be given; if it be supported by evidence; if no counter-evidence be offered; if no fraudulent use of the instrument complained of has ever been made or attempted; and no person has complained of any injury directly or indirectly caused by it,—we think that, however objectionable the practice may be of permitting, for any reason whatever, a deliberate misstatement of facts upon the face of a Deed, yet such practice, unfortunately by no means unfrequent,

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cannot be considered sufficient in itself to warrant the striking of the practitioner off the Rolls.

Even assuming the correctness of the view taken by Mr. Justice *Phear* of the Solicitor's duty, namely, that of shewing convincingly the absence of fraudulent motive, yet when a fraudulent motive has not been alleged by any complainant, such a rule can scarcely be applied if the explanation offered be not simply incredible.

Deeds are constantly prepared which, on the face of them, deal with the parties as interested, who are, in effect, only trustees for others; and the knowledge of such a practice probably influenced the framers of the Code in preparing the enactment referred to by the Chief Justice; for they confined its penal provisions to "fraudulent and dishonest" participation in such an instrument.

It appears to their Lordships, on the evidence in the present case, that *James* was intended to become, and did become, the *bonâ fide* owner of the quarter share. Mr. *Barrow* confirms the statement as to the circumstances under which he became such owner. Publicity as to the ownership was immediately given, there was no reason for representing him to be such owner with a view to protect *William* against his creditors. The Deed was acted upon at the time of the mortgage to *Hatch* as if *William* had parted with a one-quarter share. *James* was (as is stated by *McLeod*) in possession not only as Manager, but as the recognised owner of a share, and no one up to the present hour disputes the validity of that ownership. It does not seem, therefore, that any suspicion in such a state of circumstances can arise to displace the reality of the transfer made.

The reasons assigned for the false statements, though unsatisfactory, had any fraud whatever followed upon the transaction, are not inconsistent with the possibility of honest motives. Though *James* gave a consideration for his share in the shape of services only, yet if the share were really worth Rs.32,000 (and no evidence to the contrary was offered), it exceeded probably the value of his services, and his Brother might be desirous to mark the fact of his bounty. Besides this, the condition requiring *James* to offer his share to his Brother, before parting with it to a stranger, would afford some ground for stating an estimated value. It is said that the Deed contained no covenant by *James* to continue his

management, but if the property were, as it seems to have been, flourishing, such a circumstance alone would afford an adequate motive for his continuing as owner, and the condition as to offering the share to his Brother would prevent an immediate sale.

The absence of any mention of the deposit with *Thomas & Son* to secure the floating debt due to them as Agents on the purchase deed, as contrasted with the mention of it in the Mortgage, is consistent with honesty. It was necessary to inform the Mortgagee of all charges, but it was not necessary to inform the person purchasing the business of that which was really a security usual in the ordinary course of business.

The fact that *James* received no profits whilst he had a monthly salary as Manager seems to their Lordships to throw no doubt on the transaction.

Their Lordships are not aware of any such special authority as appears to be referred to by Mr. Justice *Phear*, as would authorize the striking of the Appellant off the Rolls of the High Court, where such a step would not be sanctioned by the practice of the Courts in *England*.

They desire expressly to state that they do not, in recommending to Her Majesty the discharge of this Order, in any way sanction the propriety of Deeds being prepared which on the face of them are inconsistent with fact, and wish simply to express the opinion that, upon the evidence, the irregularity was wholly unconnected with any intention to defraud, and did not, therefore, justify the penalty inflicted.

Solicitors for the Appellants: *Clarke, Son, & Rawlins.*

J. C.*
1868
June 15, 16.

IN THE MATTER OF THE PETITION OF EDWARD HUTCHINSON POLLARD, ONE OF HER MAJESTY'S COUNSEL AT THE COLONY OF HONG KONG . . . . . } APPELLANT;

AND

THE CHIEF JUSTICE OF THE SUPREME COURT OF HONG KONG . . . . . } RESPONDENT.

Contempt of Court —Barrister — Fine — One fine for several offences— Jurisdiction—Judicial Committee—Statute, 3 & 4 Will. 4, c. 41, s. 4.

Pow 357
4 CO. 697
3 PC 569.
7 App Cas 241
22 CLD 318

A contempt of Court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering.

A Barrister engaged in his professional duty before the Supreme Court at *Hong Kong*, was, without notice of the alleged contempt, or rule to shew cause, and without being heard in defence, by an Order of that Court, fined, and adjudged to have been guilty of several contempts of Court in disrespectfully addressing the Chief Justice while conducting a cause. Such Order, upon a reference by the Crown to the Judicial Committee, under the Statute, 3 & 4 Will. 4, c. 41, s. 4, set aside, and the fine ordered to be remitted, first, on the ground that the Order was bad, inasmuch as the offences charged were not of themselves such contempts of Court as legally constituted an offence; and secondly, that even if they had been so, no distinct charge of the several alleged offences was stated, and no opportunity given to the party accused of being heard, before passing sentence.

THE Appellant, a Barrister-at-law and a Queen's Counsel at *Hong Kong*, complained of a sentence of the Chief Justice (*Smale*) of that Colony, whereby he was fined and, in the alternative, ordered to be suspended for fourteen days for an alleged contempt of Court.

It appeared, according to the Appellant's uncontradicted statements contained in his case, that on the 27th of June, 1867, he appeared in the Supreme Court of the Colony as Counsel for the Plaintiffs in the case of *Olyphant & Co.* v. *Loo-a-Hung*, Mr. *Whyte* being Counsel for the Defendant. The action, which was one for breach of warranty, was tried before the Chief Justice

* *Present*:—SIR WILLIAM ERLE, LORD JUSTICE WOOD, LORD JUSTICE SELWYN, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

and a jury. The Appellant having stated the Plaintiffs' case to the jury called one of the Plaintiffs, *Hitchcock*, but as, in answer to a suggestion from his Lordship, the Defendant's Counsel had, while expressing a willingness if possible to settle the case, requested to be allowed to hear the Plaintiffs' witnesses before deciding on a settlement, and also asked the Appellant to examine a Chinese witness, the Plaintiffs' *Comprador*, first, as he had been the medium of communication between the Plaintiffs' and Defendant, *Hitchcock*, by consent, stood down, and the *Comprador* to the Plaintiffs was put into the box and examined by the Appellant in chief. During the examination, the witness having one small jar and three tins, each containing samples of sugar before him, on the table, the answers given by him, as interpreted by Mr. *Rozario*, the Court Interpreter, appeared so inconsistent and incoherent that it seemed evident some confusion existed in the mind of the Interpreter about the relation of these four samples to each other, and the bulk of the sugar, the subject matter of the action. Under these circumstances the Appellant put a direct question to the *Comprador* as to one of the samples of sugar, in order to clear up the confusion, when the Chief Justice said, "You should not lead (or press) him, Mr. *Pollard;* he is your own witness." The Appellant replied, in a deprecatory manner, "Yes, my Lord, but he is not my own Interpreter," upon which the Chief Justice said, "He is the Court Interpreter, and, therefore, your Interpreter as well as for the other party," or words to a like effect. At the conclusion of the examination-in-chief, Mr. *Whyte* proceeded to cross-examine for the Defendant. The Appellant was seated at the Bar Table looking at an authority intended to be referred to for the Plaintiffs, and taking notes, when necessary, of the cross-examination, when the witness, having stated that one of the Coolies in the service of the Plaintiffs had been to the Defendant's place about the sugar, and had seen it put into the Boats, Mr. *Whyte* asked his name, and, on learning it, turned round to the Appellant, still seated in the next chair to him, and said, "*Pollard*, are you going to produce this man, as if not, I can subpœna him." The Appellant jocularly replied to Mr. *Whyte*, "I can't produce him as if he were a piece of paper or a Book, but I shall not call him, though I dare say he is at the Plaintiffs'

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place" (near to the Court) "and you can easily send for him." Mr. *Whyte* then directed the managing Clerk of the Defendant's Attorney to get him subpœnaed. The Chief Justice then said, "Mr. *Pollard*, do I understand you to say that you are not going to produce this Coolie?" and the Appellant replied, "No, my Lord, I do not want him, but he can easily be sent for if my learned friend wants him." The Chief Justice then said, "Do you mean to say you are not going to call the Plaintiff's own Coolie, but will put the Defendant to the expense of sending a subpœna for him?" and on the Appellant replying "Yes, my Lord," the Chief Justice said, in an angry manner, "Very well, then, I shall take very good care to comment on it when I charge (or address) the jury." The Appellant then rose, and, addressing the Court, said, "My Lord, I am the Plaintiff's Counsel, and have the sole discretion as to what witnesses I shall call, and if I fail my Client may suffer; but it is solely in my discretion, and I decline being taught my duty by any one;" and the Chief Justice, in a most passionate manner, said, "No one wants to teach you your duty, Sir; sit down:" and on the Appellant attempting to speak, he said, "Silence, Sir," and left the Court.

The Chief Justice, after an absence of a few moments, returned, and without acknowledging the reverence made by the Bar on his re-appearance, sat down and said, still in a very angry and excited manner, "Mr. *Pollard*, do you apologize?" The Appellant rose and said, respectfully, "For what, my Lord?" and on the Chief Justice saying, "You know what for," assured His Lordship that he did not know. The Chief Justice then said, "You taunted me with the fact that a Coolie was not a piece of paper, as if I did not know that," and the Appellant then respectfully asked, "Is it for that your Lordship wishes me to apologize?" intending, if His Lordship had said it was, to have explained that His Lordship was in error in supposing that those words had been addressed to the Court, as they had been said jocularly to the learned Counsel on the other side, and to have satisfied his Lordship on the matter. The Chief Justice, however, said, "No, that is not all; you know very well what it is." The Appellant thereupon, in a respectful manner, addressed the Court to the following purport:—"My Lord, I have never knowingly been disrespectful to the Court in my life, and

am utterly unconscious of having been so to-day, and would be glad to know what your Lordship complains of, as no one is more ready to apologize if he have done wrong than I am." The Chief Justice said, "You would not have dared to speak to any other Judge as you have to me;" and the Appellant said, "I have done my duty for a number of years, and was never attacked in such a way before, and would defend myself, if similarly attacked, anywhere." The Chief Justice said, "You do your duty, and I will do mine," to which the Appellant replied, "If that rule be followed, my Lord, it will be much better." The Chief Justice then ordered the Appellant, who vainly attempted to address the Court several times, to sit down, and exclaiming, "Silence, Sir," "Sit down, Sir," "Hold your tongue, Sir," told the jury he would adjourn the Court till Saturday, and not proceed with the case until (or unless) Mr. *Pollard* apologized. The Appellant then rose and said, "My Lord, with the greatest respect I submit that though your Lordship has very large powers to deal with me if I have done wrong, which I am not conscious of, it is not competent to the Court to prejudice the Plaintiffs, who may choose to appear by another Counsel," to which the Chief Justice angrily replied, "I don't care, I will not proceed with the case unless Mr. *Pollard* apologizes," and, telling the Registrar to adjourn the Court *sine die*, left the Court. On the proposition of the Defendant's Counsel the record was withdrawn, and the case referred to arbitration.

On the 29th of June the Appellant was engaged as Counsel for the Plaintiffs in a case set down for trial before the Chief Justice and a common jury, and Mr. *Whyte* was Counsel for the Defendant in this case also. Before coming into Court, the Registrar came into the robing-room and asked the Appellant if he was going to apologize, because, if not, the Chief Justice would, on some future day, give his decision. The Appellant asked if he was told this as from the Judge, and the Registrar said, "No not as from the Judge, but His Lordship told me, and I think he wishes you to know." On the Chief Justice coming into Court, His Lordship asked if any one had anything to say to the Court, and after some communication to His Lordship by Mr. *Whyte*, he proceeded to read some remarks referring to the Appellant, though not addressed to him. The Appellant asked to be allowed to speak, which the

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Chief Justice refused to allow him to do, but, on his requesting that a note of such refusal might be taken, the Chief Justice then said, "Oh! if you put it in that light you may address the Court if you wish," and the Appellant then said he had never sought to be aggressive, and had always respected the Bench, as he was bound to do; but as he had been accused of some contempt of Court, and did not know what it was, he wished it to be stated as publicly as possible that he disavowed ever having intentionally insulted the Court, or been guilty of contempt, and was utterly unconscious what it was that he was accused of, but was perfectly ready to apologize if informed of what he had done, and that as His Lordship had not told him, if any Gentleman, present in Court on Thursday, would say he ought to apologize he would do so unhesitatingly, and that he was not the only member of the Bar who had been present on that occasion; adding, that he also had his position, as a member of the Bar, to maintain, for his own sake and that of the profession. The Appellant, as he was uttering the concluding words of this address, was sitting down, so that the last word or two were spoken while no longer in an erect position, but before he had actually taken his seat, when he was told by the Judge to stand up, which he did, saying that he had nothing more to say. The Chief Justice did not in any way intimate to the Appellant that he thought his manner disrespectful, or that he had been guilty of any new contempt on that day, but on the contrary, at the rising of the Court, late in the day, said, "I shall give my decision on the Thursday's occurrence on Tuesday instead of Monday."

The Appellant conducted the case for the Plaintiffs, which lasted for some time, and, at the close of his reply, the Chief Justice called the Appellant and Mr. *Whyte* up to the Bench, and made suggestions which resulted in the Defendant agreeing to a verdict against him for a specific sum.

The Appellant appeared in Court on Tuesday, the 2nd of July, 1867, and on his Lordship taking his seat he directed the Registrar to call on the Appellant to rise while the Court proceeded to address him. The Appellant thereupon objected to the jurisdiction of the Court to proceed at that time and in that manner against him for any contempt alleged to have been committed by him on a pre-

vious occasion. The Chief Justice then again ordered the Registrar to call upon the Appellant to stand, while the Court delivered its decision. The Appellant repeatedly requested to be allowed to speak, and be heard in defence or explanation, but was refused. The Chief Justice then pronounced the following judgment :— "Mr. *Pollard*: After several delays, it now becomes my painful duty to deliver the decision of this Court on your conduct on Thursday, the 27th of June last. These delays have been interposed in order to give you time to reflect calmly on your conduct, and by submission and apology to render the exercise of the indisputable authority of this Court to punish for contempts towards it unnecessary. In expressing what appears to be my duty on the present occasion, I shall in substance adopt the language of the Chief Justice *Abbott*, of Mr. Justice *Bayley*, of Mr. Justice *Holroyd*, and of Mr. Justice *Best*, preferring to use language frequently since repeated, always with approbation, to any less forcible words of my own selection. The language of Mr. Justice *Holroyd*, in *Rex* v. *Davison*, is (1) :—'In the case of an insult to himself, it is not on his own account that he commits, for that is a consideration which should never enter his mind. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others.' And Mr. Justice *Best* (2) also says: 'No man who pretends to any knowledge of the law can doubt that a Judge of a Court of Record has authority to fine or imprison for any contempt, committed in the face of the Court. From the earliest period of our history, this authority has been exercised.' Every man who comes into a Court of Justice, either as a party or Barrister, must know that decency is to be observed there, that respect is to be paid to the Judge. Of the power of a Judge to fine for contempt I have not the least doubt. When a case is conducted by Counsel they know perfectly well what the rules of law are, and they have that regard for their own character which generally prevents them from doing anything which may break in upon the rules of decency and decorum. Chief Justice *Abbott*, in the same case (3), says :—'If I thought that the decision I am about to pronounce could have the effect of

(1) 4 B. & Ald. 339. (2) Ibid. 340. (3) Ibid. 333.

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restraining any person who may hereafter stand on his trial, from making a bold, as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question, whether the law of the land shall, or shall not, continue to be properly administered. For it is utterly impossible that the law can be so administered, if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the Judges, not for their personal protection, but for that of the public. And a Judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise.' I have now quoted enough to shew that this Court has the power of punishment by fine or imprisonment, and in the case of a Barrister, as the learned Queen's Counsel has drawn a distinction between an Attorney and a Barrister, I would refer him to this case. Of the power of a Judge to fine for contempt of Court, I have not the least doubt. The duty to punish contempts of Court, and the right of the Court to fine and imprison the offender, and, in the rare case of his being a Barrister, to suspend him from practice, being proved by abundant cases. It is more satisfactory, however, that I should go into a detail as well as I can, and so far as I deem necessary, of the circumstances as they occurred. In the case of *Olyphant & Co.* v. *Loo-a-Hung*, you opened the case for the Plaintiffs as a breach of warranty to ship sugar to *Shanghai* of a specified quality. Your first Chinese witness, the *Comprador* of the Plaintiffs, proved the signature by the Defendant to a contract in English, and that he had translated the document to the Defendant. In the course of that examination you persistently, though more than once stopped by me, put leading questions to the *Comprador*. And I felt that under his Master's eye—that Master sitting close to you—and with your peremptory leading questions, one sort of answers only could be expected from him. I at length again objected to your persisting in putting such leading questions, saying to you 'Why, he is your own witness.' Your answer to me was inferentially insisting that you had been right. 'The Interpreter is not.' This answer offended propriety. It inferred an imputation on the Interpreter, who has been a zealous and honest Interpreter

for some seven years, and it ignored the rule being, as it always has been, imperative as to a Chinese as well as to an English witness. Your answer was pointed and curt, and was apparently made to raise, and only to raise, a laugh against me. This was your first contempt of Court, on which I said nothing then. The case proceeded. Mr. *Whyte* asked the *Comprador* of your Clients, in cross-examination, questions to shew that he had examined the sugars as they were packed by direction of the Plaintiffs so as to shew an approval by the Plaintiffs of the sugars before they were shipped. So far as it went, the evidence of Plaintiffs' *Comprador* tended to sustain the defence. You, with unnecessary vehemence, insisted to me that this evidence could not be received. I decided to receive it, and your demeanour was, to say the least, offensive and disrespectful in consequence. It appeared to be a point with the Defendant to shew that the Plaintiffs, by their servants, had approved of each package of sugar before it was shipped, and it was extracted from your Clients' *Comprador* that when the *Comprador* was absent a trusted Coolie of the Plaintiffs' was present. Mr. *Whyte*, for Defendant, asked where that Coolie was. Thereupon I said to you that, as he was a servant of the Plaintiffs, you should produce him in Court:—Thereupon you turned to me, and, looking me steadfastly in the face, you said with a scornful expression of countenance, our eyes meeting, and in a discourteous and defiant manner. 'He is not a piece of paper to be produced in Court. Let the Defendant subpœna him in the usual way.' On that I, considering that the Defendant was a Chinaman, said to this effect, 'Do you mean, Mr. *Pollard*, to put them to the expense and difficulty of finding and subpœnaing your own servant.' Upon this you, with vehemence of tone and manner, said to me, 'I will put only those witnesses into the box which I, as Counsel for the Plaintiffs, think fit. I will not be dictated to or talked down by anyone as to what I am to do.' I was taken aback, and said, 'I was not dictating to you, or talking you down; you will do your duty, and I will do mine.' I meant, as you must have known, indeed, I believe I added, that you would call or not call witnesses according to your duty, and that I, in directing the jury, would do mine in directing them to make the proper inferences from your keeping back such a witness. What you said, added to your tone

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and manner, inferred that I had improperly dictated to you, and that I had improperly attempted to talk you down. This was your second contempt of Court. Now, there at least should have been an end, but, acting on your all but universal rule, you would, and did, reply to me, and you said, 'That is all right if we would only stick to it,' in a tone and with a manner which inferred, and must have been meant to infer, that I would not. Now, this was your third contempt of Court. By this time your manner towards me appeared to me to be violent, and your general bearing was such as that I felt the cause could not then proceed with any chance of justice. I felt that the Court had been grievously insulted. I felt it to be my duty then and there, either to have committed, or to have imposed a fine on you, but at the same time I feared that anger might be present in my mind, and I left the Bench as the least evil before me, and to avoid what from experience I had too much reason to expect—a continuance of insult. After an absence which I now wish had been longer, I returned to the Bench. On my return, your manner was contemptuous towards me. Not noticing that, I asked whether you would apologize. Your curt notice of this was, 'For what, my Lord?' You then went into wide generalities, that if you had offended no one was more willing to admit it and apologize. You then referred to my having asked you if you would produce a witness, on which I said that you had tauntingly told the Court a witness was not a piece of paper, as if I did not know a witness was not a piece of paper. Thereupon you said, admittingly inferentially that you had said so, but still in a defiant manner, 'Is it that you wish me to apologize for?' I said, 'Yes,' and that there were other matters requiring an apology, and you proceeded to address me in a manner and tone as offensive as before, from which I felt satisfied your only object was to get me into a most unseemly wrangle. Not choosing to trust myself then to punish the contempt as I felt was necessary, and feeling that until you had apologized, or, at least, in the then state of excitement and indecorum into which the proceedings had been thrown, the cause could not properly be proceeded with, I adjourned the Court as the least objectional course. You then, still persevering in your defiant tone, protested against the adjournment as being entirely without precedent. I said I should adjourn the

Court till Saturday (the Friday being a holiday), adding 'as we cannot get on in the present circumstances;' and you still, as if you had not caused what happened, desired me to take a note of your objection. You then said, 'If I have done any wrong, there are certain steps which may be taken by the Court,' and you requested me to take a note of your objection. By this language you adopted deliberately all you had previously said, and, so far from apologizing, courted the consequences on yourself personally of your contempts. I replied, there were such steps, but that I would not then take them, it being my duty merely to decide that you were guilty of a contempt of this Court on Thursday, the 27th of June last. It is thought to be a rare case to suspend a Barrister from practice, but, as I have said, there are many such cases. I can refer you to a case in which then and there, for contempt of Court, a Barrister had his gown, by order of the Court, pulled off his back. You proceeded, and I had peremptorily to say, 'Silence, Sir.' I said you would not dare to use elsewhere such language as you had used. I added, the Court is adjourned. Still you persisted in renewing your unseemly language to the Court, addressing me after I had requested you to be silent, and after I had adjourned the Court. One of your observations was, 'I always answer when I am attacked, and not without.' Your speaking at all was an indecorum: what you said was a contempt in imputing to the Court that it had attacked you, which was the converse of what had occurred. I consider this your fourth contempt. I was thus, by what you said after the Court was adjourned, driven to adjourn the case so far indefinitely, and I said I could not hear it, you being Counsel, till you should have apologized. I am glad to find that the cause out of which the above occurrences arose has been referred to arbitration, because I feel sure that the arbitrators will decide according to the right of the case, which unfortunately this Court, being tied by technical rules applicable to another state of society, can scarcely do. On Saturday another case came on, in which you again appeared as Counsel. I, having previously directed the Acting Registrar to communicate with you my intention to give a decision unless you previously apologized, asked if any Gentleman had anything to say in reference to Thursday. You were present, looking very indignantly at me, but said

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nothing. I then shortly referred to and cited the leading cases, shewing that, *ex necessitate*, I was bound to punish an insult to the Court, and advised consideration of those cases to persons interested in the matter. My intention was, obviously, to give you another opportunity, after referring to the law, to apologize. I said I would give my decision on Monday, and that you had due notice. You, taking the matter as one of dry notice, said, 'I have received no notice.' It seemed that the Acting Registrar had told you I should give my decision, but he omitted to say on Monday, as I had intended he should. The spirit in which the objection, that you had not received notice, was made, satisfied me that you did not understand what had passed in its true bearings. Having obtained leave to address me, you began thus:—'Merely this, my Lord, I don't seek to be aggressive.' This language, under the circumstances of your being before me as charged with contempt, was a contempt, and I designate it your fifth contempt. You proceeded, 'It is the Bench I respect.' This was said in a tone which clearly inferred, and was meant to infer, that it was the Bench as distinguished from its occupant that you, a Queen's Counsel, had such respect for as you professed to have. This was a contempt, according to the highest authority, of a very grave character. This was your sixth contempt. You then proceeded to say that you had done nothing which could be properly called an insult. You then sat down and continued to address me, sitting on, and I had to request you to stand whilst you addressed the Court. You then said that was all you had to say. I give you credit for having uniformly insisted, as you did in your defence, that you have said and done nothing which can properly be called an insult to the Court. I have no desire to conceal the fact, that the difficulty you have imposed on me has very deeply pained me ever since Thursday last, and that it will continue greatly to pain me, probably more than it will pain you, not because I am anxious as to my own personal position other than as it is important to sustain the judicial *status* in this Colony, but because I respect your legal learning, and because our own forensic contests have left on my mind pleasant remembrances of kindly feelings towards you, which even present circumstances cannot change, and because you have many qualities which deservedly make you popular. If, in duty

to my office, I could have overlooked your conduct, I would have done so, but to mark my sense of your conduct is, in the words of Mr. Justice *Holroyd* in *Rex* v. *Davison* (1), a duty which I owe to the station to which I belong. You say you have never insulted the Court. Whether you are justified in distinguishing the Court and its successive occupants in that language, I leave for you to consider at leisure; you have insulted me, and in insulting me you have insulted the Court. I may add that the more humble is the occupant of the Bench for the time, the less learned and competent he may be for his office, the more important is it to surround him with those forms of respect which have been devised to support authority against those who would usurp, subvert, or destroy it. I now proceed to pronounce my decision as, *ex necessitate rei*, the only judge of fact and law. I pronounce you guilty of grave contempts, and as, from equal necessity, this is the only Tribunal that can award the punishment, I now fine you in the sum of $200, and, further, I suspend you from practising before this Court as a Barrister and Advocate for a period of fourteen days, or until the fine shall be sooner paid. I have purposely fixed the fine and penalty at the lowest point possible compatible with its being an expression of my opinion of your conduct. Some persons may think that you have only shewn the just independence of the Bar in your habitual demeanour and language towards the Bench. I, however, think I have seen in it impediments to a Judge in the due administration of justice; sometimes, indeed, as I am inclined to think, to the undue advantage of Clients. The penalty I impose is, indeed, small, but the effect of the decision is more serious."

The Appellant remained suspended from practice under the sentence for several days, but ultimately paid the fine, under protest.

The Appellant, aggrieved by this sentence, forwarded to His Excellency, the Governor of *Hong Kong*, a petition to Her Majesty, setting forth the facts hereinbefore stated, and praying that the matter of the petition, and the proceedings of the Chief Justice, on the 27th and 29th of June, and the 2nd of July, might be investigated and inquired into, and that the sentence might be wholly rescinded, reversed, and expunged from the minutes of the

(1) 4 B. & Ald. 339.

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Court. The Appellant supported the above facts, which were set forth in his petition, by his own affidavit, and the affidavits of Mr. *Whyte*, the Counsel engaged in the case of *Olyphant & Co.* v. *Loo-a-Hung*, and of all the jurors in that case, also of Mr. *Blakeman* and Mr. *Bain*, both present in Court on the occasion of the alleged contempts of Court, which, in substance, sustained the case as alleged by the Appellant. Copies of the petition, and the affidavits in support of it, were transmitted by His Excellency, the Governor, to the Chief Justice for his information. In consequence of an objection taken by the Chief Justice to the affidavits being made upon oath, they were afterwards made in the form of declarations under the 5 & 6 Will. 4, c. 62.

The petition, together with the evidence in support of it, was forwarded by the Governor to Her Majesty, who referred the matter to the Judicial Committee for their opinion. The Appellant prayed that the proceedings of the Chief Justice, on the 27th and 29th of June, and the 2nd of July, 1867, respectively, might be investigated, and rescinded, reversed, and expunged from the minutes of the Supreme Court.

No case was lodged or evidence entered into by the Chief Justice.

Mr. *Watkin Williams* (Mr. *Coleridge*, Q.C., with him) for the Appellant:—

It is not disputed that a Court of Record in the Colonies has power to fine and imprison for contempt of Court, but such power must be properly exercised, not, as was done in this case, arbitrarily and capriciously. Here the sentence complained of was oppressive and illegal. Upon the face of the judgment itself, the Appellant was not guilty of any contempt of Court. It is settled law that where a Court of competent jurisdiction imposes a fine, no appeal lies in respect of such fine: *Rainy* v. *The Justices of Sierra Leone* (1); but to prevent the denial of justice, the Crown has referred the matter of the Appellant's petition to this Tribunal under the Statute, 3 & 4 Will. 4, c. 41, s. 4, and it is competent for your Lordships, under that reference, to examine into the merits: *Rainy* v. *The Justices of Sierra Leone* (1), and for us to prove by affidavits that no such contempt as was assumed by the

(1) 8 Moore's P. C. Cases, 47.

Chief Justice took place: *Smith* v. *The Justices of Sierra Leone* (1). That course was adopted in *Re Pater* (2); there a Barrister was fined by the Court of Quarter Sessions for contempt, and the Court of Queen's Bench, which has a general superintendence over Courts of inferior jurisdiction, on a writ of *certiorari*, investigated the merits, as to the reasonable grounds, of the contempt. Here the declarations in evidence conclusively establish that no contempt was committed or intended to the Chief Justice or the Court. The case of *Rex* v. *Davison* (3), relied on by the Chief Justice, has no application to the case. It related to the power of a Judge at *Nisi Prius* to fine for a contempt. Both the proceedings as well as the sentence here were irregular, and, therefore, void. The Appellant had no notice of the offence with which he was charged, neither was he heard in defence before sentence was pronounced. He had a right to know what offence he had committed, and notice, and a rule to shew cause, ought to have been served on him before any sentence of suspension could be pronounced against him. No such course was pursued here. The Chief Justice entirely overlooked the maxim, "*Audi alteram partem*," so universally recognised—*Bagg's Case* (4)—and refused to hear the Appellant in explanation or defence. In *Capel* v. *Child* (5), it was held by the Exchequer Court, that where a Bishop issued a commission, upon a requisition, under a Statute, on which the whole of the proceedings were founded, such proceedings were in the nature of a judgment, and void if the party had no opportunity of being heard. So in *Reg.* v. *The Archbishop of Canterbury* (6), where the Archbishop confirmed a revocation by the Bishop of the Diocese of a license of a curate, without hearing the party or his Counsel, a *Mandamus* issued to him to hear the case on its merits. Again, it was not competent for the Court to punish the Appellant for an alleged contempt of Court committed on days anterior to that on which the judgment was pronounced, and after having heard the Appellant as Counsel in Court in the meantime.

(1) 7 Moore's P. C. Cases, 174.
(2) 5 B. & S. 299.
(3) 4 B. & Ald. 329.
(4) 11 Co. Rep. 99 c; and see *Rex* v. *Benn*, 6 T. R. 198.
(5) 2 C. & J. 558.
(6) 1 E. & E. 545.

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Mr. *James*, Q.C., and Mr. *Hulme*, appeared for the Chief Justice:—

The Chief Justice has not deemed it consistent with his duty to bring forward evidence in reply to the affidavits of the Appellant, or to appear as a litigant in the matter. Without contesting the case brought forward, we submit that the tone of the affidavits filed by the Appellant is not respectful to the Chief Justice or the Supreme Court.

At the close of the argument, their Lordships intimated that they would certify their opinion to Her Majesty upon the matter.

No judgment was given, but the following report was made by their Lordships, and confirmed by Her Majesty's Order in Council, dated the 19th of June, 1868:—"The Lords of the Committee, in obedience to your Majesty's Order of Reference, have taken this petition into consideration, and having heard Counsel on behalf of *Edward Hutchinson Pollard*, and having likewise been attended by Counsel on behalf of His Honour the Chief Justice of *Hong Kong*, their Lordships do agree humbly to report to your Majesty that, in their judgment no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed: their Lordships further report to your Majesty that, on the proceedings before them, it appears that Mr. *Pollard* has received one sentence as for six several offences, and that in the statement of those alleged offences in the judgment pronounced by the Chief Justice, their Lordships are not satisfied that each of the six amounted to a contempt of Court, or was legally an offence: for these reasons their Lordships humbly recommend to your Majesty that your Majesty should be graciously pleased to remit the fine of 200 dollars which was imposed on *Edward Hutchinson Pollard* by the Order of the 2nd of July, 1867." Her Majesty, having taken this report into consideration, was pleased, by and with the advice of

Her Privy Council, to approve thereof, and of what was therein recommended, and to order, that the fine of 200 dollars, which was imposed on *Edward Hutchinson Pollard* by the Order of the 2nd of July, 1867, be remitted. Whereof the Governor, Lieutenant-Governor, or Commander-in-Chief of the Colony of *Hong Kong* for the time being, and all other persons whom it may concern, were to take notice, and govern themselves accordingly.

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Solicitors for the Appellant: *Freshfields.*

THE NATAL LAND AND COLONIZATION COMPANY . . . . . } APPELLANTS;

AND

CHARLES HENRY GOOD AND JOHN CECIL BOWES . . . . . } RESPONDENTS.

J. C.* 1868 *July* 2.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF NATAL.

Natal — Roman-Dutch Law — Fraudulent Purchase — Registration — Notice — Mortgage — Foreclosure — Priority — Interdict — Judgment — Evidence — Res inter alios acta.

By the law prevailing in *Natal*, the registered title of an innocent purchaser clothed with the legal estate, prevails over the title of a Claimant of a mere equitable estate, although such equitable estate may be of priority of time.

A. purchased from *B.* lands in the Colony of *Natal*, and registered the same. *A.* afterwards mortgaged the lands to *C.*, and delivered to him the *grosse*, or copy, of his registered title deed. This mortgage was also registered. Default having been made in payment of the principal and interest of the mortgage money, *C.* brought a suit in the nature of a foreclosure suit, and obtained a provisional sentence, by which the same was declared executable in satisfaction of the mortgage debt, and the lands attached for the amount due upon the mortgage. Before any sale took place under such attachment, *D. & E.* obtained an interdict from the Supreme Court against the transfer, on the allegation that previously to the sale to *A.*, *B.* had sold the lands to them, and that *A.* had notice of such previous sale. *D. & E.* afterwards instituted a suit against *A.* (without making *C.*, the mortgagee, a party). The object of the suit was to set aside the original sale from *B.* on the ground that the sale

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* *Present*:—LORD ROMILLY, THE LORD CHIEF BARON (SIR FITZ-ROY KELLY), SIR JAMES WILLIAM COLVILE, AND SIR EDWARD VAUGHAN WILLIAMS.

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and registration was a fraudulent transaction between *A.* and *B.*, and *D.* and *E.* obtained a judgment, whereby the Supreme Court adjudged the transfer to *A.* to be cancelled and set aside. In consequence of the interdict restraining the sale, *C.* instituted a suit against *D.* & *E.* and *A.* to set aside the interdict and enforce the provisional sentence obtained by him. In this suit the only evidence of the alleged fraud between *A.* and *B.* was the judgment in the suit by *D.* & *E.* against *A.* The Supreme Court at *Natal*, acting upon that judgment, decreed in favour of *D.* & *E.* Upon appeal, such judgment reversed by the Judicial Committee, on the ground that the judgment in the suit by *D.* & *E.* against *A.* was not admissible in evidence, being, so far as respected *C.*, *res inter alios acta*, and binding only on the parties to that suit; and that, in the absence of any evidence of fraud in the original transfer between *A.* and *B.*, the interdict obtained by *D.* & *E.* could not be sustained.

IN this case the appeal was brought from a judgment of the Supreme Court of the Colony of *Natal*, given in favour of the Respondents in a suit brought by the Appellants against the Respondents and *Michael A. A. P. Crowly*.

The circumstances of the case were as follows:—

In October, 1856, a Farm, containing about 8200 acres, situated in the County of *Klip River District*, in the Colony of *Natal*, called *Matowaan's Kop*, was granted by the acting Lieutenant-Governor of the District of *Natal* to one *Spies*. He afterwards sold the Farm to *Crowly*, in consideration of the sum of £75, and by a Deed of transfer, registered at the office of the Registrar of Deeds at *Pietermaritzburg*, in the Colony of *Natal*, on the 22nd of October, 1863, *Spies* ceded and transferred the Farm to *Crowly* in fee.

Crowly, by a mortgage deed, dated the 24th of October, 1863, and registered, mortgaged the farm to the Appellants for securing, with interest, the sum of £800 lent by them to him on the security of the Farm. The Respondents' case was that, prior to the sale and transfer of the Farm to *Crowly*, *Spies* had sold the same to them, and that they had possession. No transfer of such Farm to the Respondents was ever executed, but the Respondents alleged that *Crowly* had notice of the Respondents' equitable title at the time the Farm was transferred to him by *Spies*, and he was registered as the legal owner.

On the 4th of May, 1864, the Respondents obtained an order of the Supreme Court interdicting the transfer of the Farm, and they afterwards brought an action against *Crowly*, without citing or making the Appellants, as such mortgagees, parties thereto,

whereby the Defendant *Crowly* was called on to shew cause, amongst other things, why he should not be condemned to render to the Respondents the legal title to and transfer of the Farm, and cancel the Deed of transfer by which the Farm was ceded and transferred to him by *Spies*, or, in default, why such Deed of transfer should not, by the judgment of the Court, be declared null and void.

The case was tried by a jury, and, after two trials, the Supreme Court gave judgment in favour of the Respondents, and thereby adjudged the transfer of the Farm to *Crowly* to be cancelled and set aside on the ground of fraud.

Notice of the order of the Court of the 4th of May, 1864, interdicting the transfer of the Farm, was, it appeared, for the first time given to the Appellants in a letter addressed to their Manager by the Respondents' Attorney on the 22nd of March, 1865. The Appellants had, on the 1st of February, 1865, attached the Farm in satisfaction of a provisional sentence of the Supreme Court granted on the 24th of January, 1865, in their favour, by which sentence the Farm was declared by the Court to be executable in satisfaction of the sum which the Appellants thereby recovered provisionally against *Crowly*, being the amount then due to the Appellants for principal and interest on the above mortgage.

The Appellants being unable to sell the Farm in consequence of the interdict, instituted, in October, 1865, the present suit against the Respondents and *Crowly*, by summoning them to shew cause why final judgment should not be recorded in the suit in which the above-mentioned provisional sentence was obtained of the 24th of January, 1865, against *Crowly* for the sum due on the mortgage, and why the interdict obtained by the Respondents should not be removed and set aside, the Farm sold, and sentence of perpetual condemnation to silence pronounced against the Respondents. The declaration contained averments of the principal facts above mentioned.

The Respondents pleaded to this declaration; and by their special plea admitted the loan from the Appellants to *Crowly*; the execution of the mortgage deed; the provisional sentence, and the issue of the attachment for attaching the Farm, as well as the interdict, but alleged that they were the legal and rightful owners

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of the Farm, and that they were taking proceedings to obtain legal title and possession thereof, to which they alleged that *Crowly* had fraudulently procured the registration in his name.

The Appellants replied, *inter alia*, that they had no knowledge before or at the time the mortgage was executed and passed before the Registrar of Deeds of the Colony, that *Crowly* had fraudulently procured the registration of the Farm in his name.

The Respondents, by their rejoinder, denied all the matters contained in the replication, and joined issue with the Appellants. *Crowly* confessed judgment in this action, and such confession of judgment was entered of record.

The cause came on for hearing on the 25th of January, 1866, before the Chief Justice *Harding*, and the acting first and second Puisne Judges.

The evidence adduced on behalf of the Appellants consisted of the testimony of *Carl Behrens*, the General Manager of the Appellants' Company. He proved the application for the loan by *Crowly*, and the lending of the sum by the Appellants on the mortgage of the Farm, and stated he knew of no irregularity of the sale from *Spies* to *Crowly*. Upon the cross-examination of this witness, it appeared that when the deeds of transfer came to his hands, and he sent them to his Solicitor to prepare the mortgage deed, he probably saw that the sum of £75 was the purchase price given by *Crowly* for the Farm, but that the witness did not know it before then. It also appeared from his evidence that one *Wirsing*, who, acting under a power of Attorney granted to him by *Spies*, had transferred as such Attorney the Farm to *Crowly*, was the agent in *Pietermaritzburg* of the Appellants' Company when the loan was advanced; and it further appeared that *Eugene B. Crowly*, a brother of *Michael A. A. P. Crowly*, was an Accountant in the office of the Appellants, but that he never informed *Behrens*, nor any of the Directors of the Appellants' Company, to the knowledge of that witness, of any dispute with regard to the title to the Farm. These circumstances were relied on by the majority of the Judges of the Supreme Court, as shewing that, although the Appellants had not actual notice of any fraud, they had knowledge enough of the transaction to have made it incumbent on them to have instituted inquiries before they advanced their money. The Respondents

put in the judgment of the Supreme Court cancelling the deed of transfer from *Spies* to *Crowly* in the suit by the Respondents against *Crowly*. The reception of this as evidence affecting the Appellants was objected to at the trial, but the objection was over-ruled. The Court took time to consider their judgment, and on the 31st of March, 1866, pronounced their decision. The Chief Justice and Mr. Justice *Meller* were of opinion that judgment should be for the Respondents, Mr. Justice *Phillips*, the acting First Puisne Judge, dissented.

The judgment of the Chief Justice, on behalf of himself and Mr. Justice *Meller*, was as follows:—"In this action the Plaintiffs obtained a provisional sentence against *Crowly* in virtue of a certain mortgage Bond for £800. Thereafter *Good & Bowes* obtained an interdict restraining the Plaintiffs from selling in execution the Farm specially mortgaged by that Bond; and the object of the present suit is to obtain final judgment against *Crowly*, and to remove this interdict, so that the Plaintiff may proceed to excuss the land hypothecated. The plea of *Good & Bowes* alleges that they are the legal owners of the Farm, and that *Crowly* fraudulently obtained the registration of that Farm in his name. It also makes certain admissions, such as the lending of the money by the Plaintiffs to *Crowly*, and the execution of the Bond. The replication denies that the Plaintiffs had any knowledge of *Crowly's* fraud when they lent the money. At the trial *Crowly* appeared and admitted the debt claimed, and there is, therefore, no difficulty in giving, as regards him, a final judgment for £800, with interest, and costs, in favour of the Plaintiffs. The case as regards *Good & Bowes*, however, is a very different one. They are the purchasers of *Matowaan's Kop* from one *Spies*, and have been in its actual occupation for several years. The sale and transfer of *Matowaan's Kop* to *Crowly* have, by two separate juries, and presided over by two different Judges, been declared fraudulent, and the transfer to *Crowly* set aside. And this Court has recently refused another new trial; hence the verdict of the last jury must stand, as far as we are concerned. The Plaintiffs rely much on the allegation in the replication that when they advanced *Crowly* this £800 they had no notice of any fraud, and that finding him the registered owner of *Matowaan's Kop*, they ought not to suffer. There is certainly no direct evidence of any notice

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of fraud to the Plaintiffs, but there is in the case evidence sufficient to my mind to shew that the Plaintiffs possessed such knowledge as ought to have made them pause before they advanced their money to *Crowly* on the mortgage of *Matowaan's Kop*, and that not having made the further inquiry which, as men of the most ordinary prudence, I think they were bound to make, they took the consequences of not doing so on themselves. Am I sitting here, as a juryman, to be told that the Plaintiffs, who knew that *Crowly* only very recently before October, 1863, had bought, as alleged, *Matowaan's Kop* for £75, were not bound, before they advanced £800 on a mortgage of it, to make some inquiry as to this extraordinary fact, more especially when their own appraiser valued it at £1,200 if forced into the market, and at £2,000 as a market value? Is not the circumstance of the price given for the property only a few months before the Plaintiffs advanced this large loan of £800 on land that cost only £75, and that fact shewn by the evidence to have been well known to the Plaintiffs, in itself one which would lead to further inquiry? And is it not fair to say that, not having done so, the Plaintiffs have taken both the risk and the consequences on themselves? But this is not all; there are the additional facts of the evident hurry displayed by *Crowly* to obtain not only the transfer to himself of *Matowaan's Kop*, but the money from the Plaintiffs on its security. It was transferred to him by *Wirsing*, the Agent of the Company at *Pietermaritzburg*, on the 22nd of October, 1863, and on the 24th of October, 1863, it was mortgaged to the Plaintiffs for ten times more than it cost a few months before. Nor can I lose sight of the fact, that at this very time *E. B. Crowly*, a brother of the Defendants, was the Accountant in Plaintiffs' office. Even the Registrar of Deeds was so struck with the insignificance of the price alleged to be that at which *Crowly* bought *Matowaan's Kop*, in extent 8225 acres, that he availed himself of the law in that respect, and had it valued for transfer dues, and that valuation amounted to £1,500. In my opinion, the Plaintiffs were bound, under the circumstances, to have instituted a fair amount of inquiry before they advanced their money. They made none, and, therefore, they cannot, in my opinion, complain if they should suffer. The Attorney-General has, with his usual ability, advanced arguments and authorities to

support his case. He has admitted that the authority laid down in *Voet, Lib.* 20, tit. 6, s. 8, is against him. He could not well do otherwise; and, in consequence, he has attempted to argue that the reasons assigned in the subsequent part of that section do not warrant the *dictum* laid down. I am sorry I cannot agree with him. The section lays down clearly, to my mind, that where the right of the person giving the mortgage is resolved or fails it follows, as a natural consequence, that the Creditor's right of mortgage is thereby destroyed. *Crowly's* right, as registered owner, has ceased. It has been set aside for fraud, and, therefore, the Plaintiff's right of mortgage must cease too, not only in point of law, but under the circumstances connected with this loan: *Voet, Lib.* 20, tit. 6; *Van Der Linden,* Inst. of Laws of *Holland,* p. 181. It is laid down by *Burge,* in his Comm. on the Law of Suretyship, p. 219, that it is impossible to establish any invariable rule as to fraud. He says: 'Fraud is infinite, and were a Court to lay down rules how far they would go in extending relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive.' If a case arises to which no principle already established can be applied, a new principle must be established to meet it, for the possibility will always exist, that human ingenuity in contriving fraud will go beyond any cases which have before occurred. It is laid down that 'A third person shall neither suffer nor profit by the fraud of another. Therefore, interests obtained through the fraud of another person cannot be maintained:' *Burge, Ib.* p. 229. It has been well said by Lord *Mansfield,* in *Robson* v. *Calze* (1), that 'although a third person shall not be punished for the fraud of another, he shall not avail himself of it:' *Pothier,* On Obligations, vol. i. p. 20, in notes [Trans. by *Evans*]; *Burge, Ib.* p. 229; *Huguenin* v. *Baseley* (2). It has been decided by the Courts in *England,* acting on this principle, that where relief was given against a fraud by which the husband of a tenant in tail prevented the completion of a recovery, the wife, who was no party to the fraud, was not permitted to derive any advantage from the transaction. These principles appear to me clearly applicable to this case. *Crowly* obtained his title by fraud,

(1) 1 Doug. 229. (2) 14 Ves. 287.

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the subsequent mortgage of that title was also in fraud, and one of which the Plaintiffs cannot, in my opinion, avail themselves. They must be satisfied with their remedy against *Crowly*."

Mr. Justice *Phillips*, in his judgment, after referring to a previous case of *Ross* v. *Gade*, decided in the Supreme Court at *Natal*, proceeded in these terms: "So far as I can remember the argument, and by reference to my notes, the Defendants, *Good & Bowes*, neither insisted on fraud, nor notice to the Plaintiff, but actually disclaimed such charge. Are, therefore, the circumstances relied on by the Court sufficient to justify it in saying enough was shewn to put the Plaintiff on inquiry? The circumstances are these:—Inadequacy of the price given by *Crowly*; *Wirsing*, who passed the transfer for *Crowly*, being the Agent of the Company; and the fact of *Crowly's* brother being in the employ of the Company. But, taking these facts collectively, and standing naked as I have stated them, and without further explanation, they do not bring me to a conclusion similar to that arrived at by my learned brethren, as far as my experience on this bench guides me. Adequacy or inadequacy of consideration given for land in this Colony constitutes no index of fraud. Indeed, how can it, when the value of property is far from settled, fluctuating according to the demand and the position of the particular vendors and purchasers? nor do I consider the price given by *Crowly* one greatly varying from that at which claims to grants here are generally purchased by claimants residing in the *Transvaal* country. The question of adequacy of value, had it been raised by a vendor who considered himself aggrieved by the representations of the purchaser, and sought to set aside such purchase, might be of importance, but, on the question here raised between Plaintiff and Defendants, *Good & Bowes*, I consider adequacy or inadequacy of consideration forms no element. I dispose of the fact of *Wirsing*, the Plaintiff's general Agent, being the transferor of the fraudulent title to *Crowly*, by saying that, in such matter, he was *Crowly's* Agent, or rather *Spies'*—his mere ministerial Agent for transfer; and, particularly, that he was no Agent of *Crowly's* for the purchase of the land. The fact of *Crowly's* brother being in the service of the Plaintiffs I consider of no importance. Assuming that *Crowly's* brother had a knowledge of *Crowly's* fraud, if fraud there was, are we to assume that was disclosed to Plaintiff,

or that it was any portion of the duty of *Crowly's* brother to disclose what he might know of the transaction to his employer? Indeed, my brethren, in their judgment, have evidently placed small weight upon this fact. What amounts to sufficient notice is a question of degree and of crime; what will convince one mind may fail in convincing another; but with the landmarks laid down for guidance in the judgments of *Barnhart* v. *Greenshields* (1), *Wildgoose* v. *Wayland* (2), and the other cases cited on the question, I cannot help feeling that, if I say the circumstances which are against the Plaintiff in this case are sufficient to affect him with notice or put him on his inquiry, I extend the doctrine of notice to a degree far beyond what it has hitherto reached. I would say, in the words of the judgment of *Barnhart* v. *Greenshields* (1), 'It would be inconsistent with the security of all property, and with every rule and principle of equity, upon such evidence as this to affect the conscience of the purchaser:' *White* and *Tudor's* Cases in Equity, vol. ii., p. 43 [3rd Edit.]. That the doctrine of notice should be limited rather than extended, an eminent Judge, Sir *William Grant*, clearly expressed himself, in the case of *Wyatt* v. *Barwell* (3). But the opinion of my brethren does not altogether rest upon the question of notice. They reason that the estate failing, the interest derived out of the estate must fail with it. And the doctrine or law laid down in *Voet*, as cited by the Chief Justice, would appear to confirm this opinion. But on this point I incline to the view taken by the Attorney-General, that *Voet's* doctrine is too broad, and unsupported by the authorities and reasons he deduces, which, in my sight, merely amount to this, that where an inferior estate is created, an interest derived out of such estate cannot enure beyond the particular estate out of which such interest was created. For example, that a mortgage or annuity created by a tenant for life, and charged in the life estate, cannot enure beyond the same. In the Plaintiff's case, his interest was created out of and attached to the fee or perpetuity in the land; that fee was then in his grantee, and must exist somewhere for ever, and if it is that Plaintiff's interest ceases with the title of its grantor, then his interest is one rather dependent on the person than the

(1) 9 Moore's P. C. Cases, 38. (2) Gouldsb. 147, pl. 67.
(3) 19 Ves. 439.

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estate, and to admit this would be to admit that the question of fraud or notice is in every case immaterial, should never be raised, and that no relief ought ever to have been accorded by Courts of justice to a party styled an 'innocent purchaser.' As I said before, my opinion and judgment in this case is a natural *sequitur* to my opinion and judgment in *Ross* v. *Gade*. The title of an innocent purchaser clothed with the legal estate in the land must prevail over the title of the claimant of a mere equitable estate, although such equitable estate may be of priority of time. A mortgagee is a purchaser *pro tanto*. And, therefore, in my opinion, the land mortgaged, although in the hands of *Good & Bowes*, is subject to the claim created by the fraudulent purchaser, *Crowly*."

The opinion of the majority of the Judges being in favour of the Respondents, judgment was given for them, with costs.

The appeal was from this judgment.

As the Respondents did not appear, the appeal was heard *ex parte*.

Mr. *Pearson*, Q.C., and Mr. *Paterson*, for the Appellants:—

This is a question of priorities affected by registration. The transfer of property by the Roman-Dutch law prevailing in *Natal* is by transport and an Act of Court. The Secretary gives the parties a *grosse*, or copy, which is the evidence of title: *S. Van Leeuwen*, Dutch Law, *Lib.* iv., c. xii., s. 4; Report of Law of *Demerara*, p. 203; *Van Der Linden*, Inst. of Law of *Holland*. p. 258 [Trans. by *Henry*]; *Burge's* Comm. on Col. & For. Law, vol. ii., p. 722; and *Steele* v. *Thompson* (1).

Here the Farm was mortgaged to the Appellants by *Crowly*, the person in whom the legal estate was at that time vested, and who was the registered legal owner. The Appellants advanced their money *bonâ fide* on the security of the Farm. The mortgage taken and registered by them was without notice of the equitable claim of the Respondents on the Farm. The burden of proving that the Appellants had notice at the time the mortgage was executed to them, that *Crowly* had fraudulently procured the registration of the Farm in his name, if any such fraud existed, lay on the Respondents, so with respect to alleged inadequacy of

(1) 13 Moore's P. C. Cases 280; and see *Bentinck* v. *Willink*, 2 Hare, 1.

the consideration money for the transfer, and they entirely failed to prove any such case. There was no evidence to warrant the judgment of the majority of the Court that the Appellants were bound to make further inquiry before they made the advances to *Crowly* on the security of the Farm. The judgment in the suit between *Good & Bowes* against *Crowly*, finding that there had been fraud by *Spies* and *Crowly* with respect to the consideration money for the transfer, and in registering the deed, did not affect the Appellants. Not being parties to that suit it was as against them *res inter alios acta*, and inadmissible in evidence. Neither the pleadings or the evidence in the cause warrant or can support the judgment appealed from.

THE LORD CHIEF BARON:—

This is an appeal against a judgment pronounced in the Colony of *Natal* upon what in this country would be termed a motion to dissolve an injunction. It is, in fact, a suit to remove what is termed an interdict, which had been granted against the Plaintiffs, the now Appellants, who sought by a proceeding in a Court of Justice in this Colony to obtain judgment against a person of the name of *Crowly*, in respect of the mortgage of a place called *Matowaan's Kop*, upon which a sum of £800 had been advanced.

The circumstances are very short and simple:—*Crowly* opened a negotiation on the 10th of October, 1863, with the Plaintiffs, who are Bankers, for a loan of £800 upon the security of this property, called *Matowaan's Kop*, and, after some correspondence, the Plaintiffs agreed to advance that money, and they did advance it upon the mortgage in question. Now, it appears, when we look into the evidence, that *Crowly* had become the owner of this property under a conveyance to him from a person of the name of *Spies*, and that conveyance certainly is dated as late as the 22nd of October, 1863. But that conveyance was duly registered. There was a transcript or copy, called a *grosse*, of that conveyance, which was part of the title, and, therefore, there was nothing to shew, and nothing to lead to a doubt, but that *Crowly* had become lawfully possessed of and entitled to this property under that conveyance from *Spies* of the 22nd of October, 1863, and the Plaintiffs having agreed to advance this money on mortgage, the mortgage

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was accordingly executed and the property thus conveyed to them two days afterwards, on the 24th of October of the same year 1863. It appears by a letter in which the correspondence began, and it is by no means an unimportant circumstance in this case, if there really had been any question of title between these now litigant parties, that the title deeds of the property were delivered over to the Plaintiffs, the mortgagees, at the time when the transaction took place. They advanced their money, they took their mortgage, and they retained their security for more than two years afterwards. About a year after the mortgage, in the month of October, 1864, the interest upon the mortgage not having been duly paid, and after some indulgence shewn to the debtor, *Crowly*, proceedings were instituted, which would be in the nature of a suit for a foreclosure in this country, to give to the Plaintiffs the benefit of the mortgage, and to entitle them to the possession, and, if necessary, to the sale of the property; and they were about to obtain a judgment to that effect when the Respondents came upon the field and obtained an interdict or injunction to stay the judgment and execution impending against *Crowly*. In due time the Plaintiffs instituted this suit, which is, in effect, a suit to dissolve that injunction, or to remove that interdict, and upon the matter coming before the Court the title of the Plaintiffs is clearly proved. It is proved by the production of the conveyance from *Spies* to *Crowly*, and of the mortgage from *Crowly* to the Plaintiffs, with the *grosse* of each of these two instruments, which, upon the highest authority, we find to be the evidence or symbol of the title; and further, it was perfectly clear that both these conveyances had been duly registered: and among the evidences of title possessed and produced by the Plaintiffs, were the certificates of registration of both the conveyances,—the conveyance by *Spies* to *Crowly*, and the mortgage by *Crowly* to the Plaintiffs.

Then comes the question, How is the interdict to be sustained? and the only evidence before the Court in the Colony, or before their Lordships on this appeal, is simply that two years afterwards a judgment was obtained by the two Respondents against *Crowly*, which judgment finds or affirms a fraud to have been committed by *Crowly* in respect to the obtaining and registering the conveyance of this property from *Spies* to himself.

Now, the first observation which occurs is that this judgment was not admissible in evidence. It is the only proof of the fraud, but if it were ample and sufficient proof of the fraud, it is *res inter alios acta*, and in no Court of Law or Equity in this country would it have been admitted at all, except as between the parties to it, the Respondents and *Crowly*, or if a foundation for it had been laid by evidence of some fraud having been committed by which the Plaintiffs could be affected. There was no proof of any such fraud, or, indeed, of any fraud at all. Yet this judgment constituted the whole evidence in support of the interdict. If, therefore, the judgment had been admissible, and had been evidence of a fraud committed, there was no evidence that the Plaintiffs were parties to it, or affected by it, or cognizant of it.

Under these circumstances, it certainly is somewhat surprising, that any Court of Law in the world should have given effect to this interdict, and pronounced a judgment against the right of the Plaintiffs to this property. When their Lordships look to the opinions delivered by two of the Judges, they find that, independently of the supposed fraud, the case is put upon this, that in the first place, the Conveyance by *Spies* to *Crowly* is dated as late as the 22nd of October, 1863. But it appears that it happens frequently in this Colony that a purchase may, in fact, have been made, though the Conveyance is not completed and registered in the Public Registry of the Colony until sometimes as much as ten years afterwards. Their Lordships know not, therefore, when this purchase was made by *Crowly* from *Spies*, and the date of the Conveyance, therefore, is of no manner of importance, and has no bearing upon the case.

It is said that the consideration appears to have been only £75; and certainly it might have attracted attention and led to some inquiry on the part of the persons about to advance their money on this property, if they had found that it had been purchased so recently as the 22nd of October (two days before the mortgage to themselves), and for the price of £75 only. But the probability is, that the fact that £75 appeared as the purchase-money in the conveyance from *Spies* was never known at all to the Plaintiffs themselves. It may have been known to their Solicitor who prepared the deeds, but the Solicitor, if he found there had been a valuation

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of the property at £1500 for revenue purposes, and satisfied himself besides that the property was of that or of sufficient value, would not have troubled himself about the terms upon which the purchase had been effected, possibly a great many years before, when the price might have been very much less than the true value at the time of the conveyance to his clients.

Then with regard to the circumstances which are further relied upon in the opinions of the Judges of the Court below; first, that the persons concerned in the registration happened to be the Agents at *Pietermaritzburg* of the Plaintiffs, and the further circumstance that a brother, or some other relative of *Crowly*, the Manager, happened to be a Clerk in the office of the Plaintiffs; these, unaccompanied by any evidence at all connected with the transaction itself, are really quite unworthy of a moment's attention.

The case, therefore, resolves itself into this; there is a *bonâ fide* loan, upon a mortgage, of £800 by the Plaintiffs to *Crowly*, and the Plaintiffs were clearly entitled to the judgment and execution which they were about to obtain against *Crowly*. When their Lordships look to the evidence upon which it is sought to support this interdict upon the part of the Respondents, they find that there is no admissible evidence of any kind whatever.

Under these circumstances, they can only advise Her Majesty to reverse the decision of the Court below, and to give effect to the judgment under this appeal, with costs.

By an Order in Council made thereon it was ordered, that the judgment of the Supreme Court of *Natal*, of the 31st of March, 1866, should be reversed, except so far as the same is a judgment against *Michael A. A. P. Crowly*, and that the provisional judgment of the Court of the 24th of January, 1865, ought to be confirmed and carried into execution.

Solicitors for the Appellants: *Wilkinson, Stevens & Wilkinson.*

JOSEPH OXFORD, ALEXANDER LEVY-SOHN, AND JACOB ARNHOLD . . . . } APPELLANTS;

AND

ANDREW PROVAND AND ROBERT DALY. RESPONDENTS.

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ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND JAPAN (1).

Specific performance—Agreement—Vagueness—Lease—Part performance—Practice—Decree partly varied—Costs.

In a suit for specific performance of an agreement, vague in its language, a Court of Equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement.

P. & Co. entered into an agreement in writing with *O. & Co.* for the transfer to them of the unexpired term of a lease held by *P. & Co.* of land and houses at *Shanghai*, and to build or finish certain houses thereon; to proceed with the building at once; to consult *O. & Co.'s* wishes in building the houses then in progress, and in building other houses not then commenced. *O. & Co.*, on their part, agreed to take the term so to be transferred, and to pay a certain rent divided into three portions, the liability for each portion to begin from the time when the house to which that portion related was finished by *P. & Co.*, and possession delivered over by them to *O. & Co.* Both parties further agreed that a proper contract should be drawn for their mutual execution by a Solicitor named by them. No such contract, however, was executed. Possession was given, and the buildings altered by *P. & Co.* at *O. & Co.'s* instance:—

Held, decreeing specific performance of such agreement, (1), that the terms of the agreement expressed with sufficient clearness the intentions of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform; (2), that the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence that it might be performed either directly after the signing of the memorandum of agreement or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected:

Held, further, that that part of the agreement which provided that the

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* *Present*:—SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR ROBERT PHILLIMORE (JUDGE OF THE ADMIRALTY COURT).

(1) This Court is created and constituted by an Order in Council, dated the 9th of March, 1865; No. III., sec. 7.

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wishes of *O. & Co.* should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced, having regard (1) to the surrounding circumstances, and (2), to the fact of a part performance by *O. & Co.* in respect of the buildings and alterations of the houses.

Semble: The maxim in Chancery that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance; the breach being a bar when it goes to the whole, but no bar to a partial failure. In which case the party injured is entitled by a cross action to compensation.

Decree of Court below partly varied. Each party directed to pay their own costs.

SUIT for specific performance of an agreement, whereby the Appellants agreed to take from the Respondents the unexpired term of a lease held by them of certain land and buildings situate in the British settlement at *Shanghai*, in *China*.

This agreement, which was in writing, and signed by both parties, was as follows:—

"Sketch of agreement between Messrs. *A. Provand & Daly* and Messrs. *Oxford & Co.*

"The latter take from the former the unexpired term of the lease they hold for the whole ground, and four houses thereon erected and to be erected, part of which was occupied by the late *Miller's Hotel.*

"They pay for the same an annual rent of £4,000 (Four thousand pounds), but, as it will take some time to build all the houses, they take possession of the house now building in the centre and the one now used as a Billiard room, as soon as the former is finished, paying an annual rent of £1,600 from that day. This rent is increased to £2,800 as soon as the large house now building is finished, and to the above-stated £4,000 when the fourth house, which has been destroyed by fire, has been rebuilt, and is delivered. The building of all houses to be proceeded with at once.

"Messrs. *Provand & Daly* will consult Messrs. *Oxford & Co.'s* wishes in finishing the houses now building, and in building the house not yet commenced (burnt down).

"This house is to be rebuilt on the vacant piece of ground now in front of the same, so as to be contiguous to the street.

"If Messrs. *Oxford & Co.* should wish to have a larger house, or one differently built, *M. A. Provand* promises to do his best to make the original holders of the land agree to such alterations, for the extra cost of which Messrs. *Oxford & Co.* would have to pay.

"A proper contract to be made by Mr. *Cooper*, Solicitor, of *Shanghai*, and the contracting parties to bear each one-half of the expense thereof.

"*Shanghai*, 27th of April, 1863.

(Signed) "*Oxford & Co.*
"*Provand & Daly.*"

The property comprised in the agreement consisted of land and buildings thereon situate in the British settlement at *Shanghai*, in *China*.

The expression "the unexpired term of the lease" used in the agreement referred to two terms of fifteen years each from the 1st of January, 1863, which were granted by one *George Smith* to the Respondents of separate parts of the property at separate rents by two agreements, each dated the 1st of October, 1862.

At the date of the agreement between the Appellants and the Respondents the state of the property as regards the buildings numbered on the plan of the property was as follows:—No. 1 was finished, or nearly so. No. 2 was nearly finished. No. 3 had been begun; and No. 4 was not yet begun. In pursuance of the agreement, the Respondents proceeded with the buildings, and consulted the wishes of the Appellants in finishing Nos. 1, 2, and 3, and in building No. 4. In particular, the upper part of No. 2, the greater part of No. 3, and the whole of No. 4 were built and finished according to plans which were discussed between the Respondents and Appellants, and, generally, the progress of the buildings was supervised by the Appellants.

In November, 1863, before the Appellants took possession of No. 3, they employed a Surveyor to inspect the same on their behalf, and such Surveyor made a formal report to them in writing on the state of the house. The Appellants called on the Respondents to remedy the defects pointed out in the Surveyor's report, and the Respondents did so. The Appellants took possession of

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No. 3 for their own occupation at the end of November, 1863, and, on their continuing to complain of the defects of No. 3, the following written agreement respecting that house was come to between them and the Respondents in the beginning of the year 1864:—"Regarding the house occupied by Messrs. *Oxford & Co.*, it has been in addition agreed that the floors are to be kept in good order by the lessors during the term of contract, and that, in consideration of the insufficient manner in which the house has been finished, Messrs. *Oxford & Co.* are to retain the rent for this house for the first quarter in the third year of this lease towards renewing and repairing the fittings—£300 from the 1st of January to the 1st of April, 1867."

The Appellants also, after taking possession of No. 1, made considerable alterations therein, and undertook to replace the same in the original state, if required, on the expiration of the lease.

On the 3rd of May, 1864, the Respondents sent notice to the Appellants that No. 4 was finished, and on the 24th of that month the Appellants wrote to the Respondents, stating what defects they required the Respondents to make good before they would take possession, and what defects they should call on the Respondents to undertake to remedy. These defects were remedied by the Respondents.

The Appellants took possession of No. 4 on the 27th of May, 1864, and thus they had complete possession of all the buildings, having taken possession of the several buildings at the dates following, namely:—of the lower part of No. 1, in June, 1863; of the upper part of No. 1, in September, 1863; of No. 2, in October, 1863; of No. 3, in November, 1863; and of No. 4, in May, 1864. The Appellants paid rent to the Respondents, from time to time, according to the agreement, and they sub-let at different times all the buildings except No. 3, which they occupied as a dwelling-house and place of business.

During the progress of the buildings the terms of a lease of the property were discussed between the Appellants and Respondents, and Mr. *Cooper* mentioned in the original agreement prepared a draft lease in the month of July, 1863. Such draft lease was agreed to by the parties, with the exception of the clause relating to repairs. This clause was agreed to be altered in accordance

with the following letter addressed by the Appellants to the Solicitor who was then acting on their behalf:—

"*Edward Lawrence*, Esq.

"*Shanghai*, 3 Augt., 1863.

"Dear Sir,

"We have agreed with Mr. *Provand* about the clause regarding repairs. 'Lessor agrees to repair any damage arising through the act of God, or faulty construction of walls, roofs, and beams, and lessee to repair damages arising from any other cause than the above;' and we now request you to draw the lease accordingly as soon as possible.

"Yours truly,

(Signed) "*Oxford & Co.*"

The draft lease as prepared by Mr. *Cooper* was not, however, altered, and nothing more took place at the time between the parties in reference to the preparation of a lease.

At the end of the year 1864 the Respondents called upon the Appellants to accept a lease of the property according to the terms agreed on between them, and tendered them a lease accordingly, but the Appellants refused to execute the same, and on the 7th of January, 1865, in a letter sent by them to the Respondents, they wrote (among other things) as follows:—"We have, therefore, taken legal opinion as to our liability to sign a lease, and we find that we are not liable to sign a lease for fifteen years from the date of the agreement, or any lease whatever. We consider ourselves occupants or tenants from year to year only, and as such we hereby give you notice that we shall quit the premises we now occupy on the 31st of December of the present year."

As the Appellants persisted in their refusal to accept any lease of the property, the Respondents filed a petition, on the 18th of October, 1865, in Her Majesty's Supreme Court for *China* and *Japan*, against the Appellants, and prayed that the Appellants might be ordered to carry out the terms of the memorandum of agreement of the 27th of April, 1863, and to execute the lease tendered to them.

The Appellants, by their answer, insisted that the Respondents had not performed their part of the contract, that there were structural and other defects in some of the buildings, which would,

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if a lease were executed by them in terms of the memorandum of agreement, subject them, under the covenants to maintain and repair, to a large annual outlay above the yearly rent and ordinary repairs, and that it would be impossible to inhabit the premises with safety or comfort, or to sublet the same during the whole or any portion of the term of fifteen years, and they, by their answer, refused to execute the said lease or any lease whatever.

The cause was referred to the Assistant Judge of the Court (*C. W. Goodwin*, Esq.), and was heard by him. Witnesses were examined as to the alterations and repairs, and documentary evidence, consisting, besides the above memorandum of agreement, of a lengthy correspondence between the parties during the preparation of the agreement and the progress of the buildings and houses, was produced. Judgment was delivered by the Assistant Judge on the 21st of December, 1865, when he ordered that the Respondents' petition should be dismissed, with 200 dollars costs.

The cause was afterwards re-heard before the Chief Judge (Sir *Edmund Hornby*), and additional witnesses were examined. The effect of whose evidence is mentioned in the judgment. The Chief Judge delivered judgment on the 27th of March, 1866, and decreed specific performance of the agreement, and a reference to the proper Officer of the Court to settle a lease in conformity with the agreement. In the course of his judgment the Chief Judge observed:—"It must be remembered, in deciding this case, that the Defendants had full knowledge of the Builder's contract, that they, themselves, employed an Architect, and, from time to time, made suggestions, which were carried out. No doubt complaints were made, but the evidence tends to shew that there was every disposition on the part of the Plaintiffs to remove the cause of them by all means at their command; and, if anything has not been done that might have been done in January, 1865, the Defendants have no one, as it appears to me, to thank but themselves. This is no case of concealment or misrepresentation. Both parties knew, the one as well as the other, the facilities and inconveniences of building in *Shanghai*, the nature of its climate, the materials employed, and the unskilfulness of its workmen,

and, in the absence of any specific arrangement as to the character or class of houses to be built, they must be held to have contracted the one to build, and the other to occupy, houses such as could then be built with the means and appliances at hand." The Chief Judge afterwards proceeded as follows:—"My decision is based on the following reasons: I think the Plaintiffs, if they have not actually performed to the letter their agreement, have shewn every readiness and willingness to perform it, and they are still ready and willing; that there is insufficient evidence of radical structural defects, and distinct evidence that the deficiencies may be cured by the expenditure of—comparatively to the rent reserved—a small sum; that there is no special covenant to repair on the part of the tenant. They must be taken to have contracted to lease houses such as could then be built with the materials and labour at hand; that the evidence shews they were so built, although the internal fittings are now admitted faulty, although it may be doubted whether such faultiness is the result of original incompetence or unfitness, or the want of reasonable care in the use of them by the tenant; that the Defendants had every opportunity afforded them, and availed themselves of it, of seeing how the buildings were being built; that the buildings were erected with special reference to their requirements and wishes; that they entered on, and have exercised rights such as no tenant, except a tenant for a long term, would or ought to exercise; that they have sub-let two of the houses; that the tenants left these two houses at the request of the Defendants, and not in consequence of the state of repair which their houses were in; that the occupation of the Defendants has been for a long period; that they are not bound under the agreement to do repairs other than those required by law and usage; that, with respect to the house they occupy, they have waived any ground of complaint as to its internal fittings by the agreement to accept a re-abatement of rent to the amount of £300; that, if such amount had been then expended, the repairs required now would not have been so extensive, if, indeed, any would have been required. On all these grounds there must be a decree of specific performance, and a reference to the proper officer of this Court to settle a lease in conformity with the agreement. The Plaintiffs will, of course, be bound to act up

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to their engagements, or otherwise incur the penalty which, in the shape of damages, a Court of Law will be able to inflict on them."

The Appellants applied to the Supreme Court for leave to appeal from the decree made thereon to Her Majesty in Council, which was granted upon certain terms. The appeal now came on for hearing.

Sir *R. Palmer*, Q.C., and Mr. *A. G. Marten*, for the Appellants:—

It was objected in the Court below that the Respondents had not a valid lease of the premises in question, the lease to them not being under seal, and, therefore, void under the *Statute of Frauds*. That they were, therefore, unable to make a title for the unexpired term of the lease proposed to be granted to the Appellants. Another objection was also taken on the ground of laches on the part of the Respondents, that notwithstanding the notice of the 7th of January, 1865, that the Appellants would not take any lease of the premises, no proceedings were taken to enforce the agreement until the 18th of October in that year. We apprehend there are other sufficient objections to the decree of the Court below without now resorting to these grounds of objection.

A Court of Equity will not decree specific performance of an agreement such as that of the 27th of April, 1868. In the first place it is not shewn that *Smith*, through whom the Respondents derive title, was a British subject, and as such entitled to the benefit of the Treaty of *Nankin*. The presumption is, that the *lex rei sitæ* applies: *Phillimore*, Inter. Law, vol. iv., p. 532; but, without relying strongly upon this point, we submit that no title by *Smith* has been shewn, and, therefore, though possession was taken, the Court will not enforce the contract: *Tilley* v. *Thomas* (1). First: the Respondents never did the acts agreed to be done by them. The buildings which ought to have been erected and finished by the Respondents upon the property in question, were really never built or finished in a workmanlike manner, or made tenantable or fit for occupation. Notwithstanding repeated complaints on the part of the Appellants, the Respondents refused and neglected to do the works and repairs requisite for placing the buildings on the premises in

(1) Law Rep. 3 Ch. 61.

tenantable repair, and fit for occupation. Such an agreement cannot be enforced. In *Brace* v. *Wehnert* (1), *A.* agreed to grant a lease to *B.* as soon as *B.* should have built a house according to a plan to be submitted to and approved by *A.* *B.* agreed to build and take the lease; no plan having been approved of, the Court refused to decree for a specific performance. The case of *Tildesley* v. *Clarkson* (2) very much resembles the present. In that case *A.* agreed to take from *B.* a lease of an unfinished house, containing covenants on the part of *A.* to repair and keep in repair. *B.* agreed to finish the house, but the Court declined to compel *A.* to take the lease, the house having been finished in such a defective manner as to make it unreasonable. Secondly: the agreement is vague and uncertain in that part which provides that the wishes of the Appellants should be consulted in making the buildings, and cannot be carried out: *Norris* v. *Jackson* (3). In *Taylor* v. *Portington* (4) an agreement to take a lease of a house if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style," was held too uncertain for the Court to enforce. So again, the stipulation with respect to making a "proper contract," is too uncertain to be specifically decreed. The Appellants were entitled to damages for the non-building and completion of the houses, as agreed to be done by the Respondents: *Soames* v. *Edge* (5).

But even if the agreement should be decreed to be specifically performed, the decree complained of cannot stand. That decree does not direct any inquiry as to the title of the lessors, and gives no direction that they should place the premises in a tenantable condition. The decree refers the matter to the Registrar to settle a lease in conformity to certain covenants contained in the letter of the 3rd of August, 1863, which were not within the intention of the parties to the original agreement, or incorporated in it, first, for the Appellants to make substantial repairs during the term of the lease, and, secondly, for the Respondents to allow the Appellants the sum of £300 in consideration of the insufficient way in which one of the houses was built.

(1) 25 Beav. 348. (3) 1 J. & H. 319.
(2) 30 Ibid. 419. (4) 7 De G. M. & G. 328.
(5) 1 John. 669.

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Mr. *Baggallay*, Q.C., and Mr. *F. S. Reilly*, for the Respondents:—

There can be no doubt that the Respondents were, in equity, entitled to have the agreement in question specifically performed. Lord Justice *Rolt*, in *Tilley* v. *Thomas* (1), says, "contracts of this nature ought to be performed," and the Court only refused in that case to decree specific performance as time was the essence of the contract: *Nokes* v. *Lord Kilmorey* is to the same effect (2). There has been in this case part performance, and the agreement extensively acted on by both parties. On the faith of such agreement, the Respondents have expended very considerable sums of money in erecting buildings; these have been made in pursuance of the agreement, and, to a great extent, erected according to plans discussed between the parties under the supervision of the Appellants and their Surveyors, at whose requisitions alterations were from time to time made. It is true that one of the houses was not finished to the entire satisfaction of the Appellants, but they agreed to accept £300 to be laid out by themselves towards renewing and repairing the fittings. The Appellants took possession, under the agreement of the 27th of April, 1863, of the different buildings, and remained in such possession for a very considerable time. They underlet some of them, and made alterations in other portions, and then, after they had been for a considerable time in possession, they proceeded to discuss with the Respondents the terms in which the lease, and particularly the covenant respecting repairs, should be executed. The objection to the agreement on the score of vagueness and indefiniteness is untenable. There may be a close connection between vagueness, or want of precision, and impossibility of performance, but that does not prevail here. The agreement has been acted upon, and the Court can judge how far the agreement as to the buildings has been performed. None of the authorities referred to by the Appellants apply to this case. *Tildesley* v. *Clarkson* (3) is distinguishable. There the Master of the Rolls refused specific performance to take a lease, as the house in question was finished in such a defective manner as to make it unreasonable.

(1) Law Rep. 3 Ch. 72. (2) 1 De G. & S. 444. (3) 30 Beav. 419.

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There was no laches in bringing this suit. If the suit had been brought while the contract was wholly executory, some of the objections now urged might have prevailed, but here there has been part performance.

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Their Lordships reserved their judgment, which was now pronounced by

SIR WILLIAM ERLE :—

This is an appeal from a decree of the Supreme Court of *China* and *Japan* in a suit for the specific performance of a Memorandum of agreement dated at *Shanghai*, the 27th of April, 1863. [His Lordship read the agreement, *ante*, p. 136.]

The Plaintiffs in the suit prayed that the Defendants might be ordered to carry out the terms of that Memorandum, and to execute the underlease set out in the record, which, it was alleged, had been approved of by the Defendants. The Defendants, by their answer, denied, among other things, that the Plaintiffs had performed their part of the contract in respect of the buildings mentioned therein, and they contended in argument that the agreement was so vague that a suit for the specific performance of the part of it relating to a "proper contract" could not be maintained. These defences were overruled by the decree of the Court below, for the reasons stated in the judgment of Chief Justice *Hornby*, upon which that decree was founded, against which judgment this appeal was brought. The Appellants here, in addition to the defence in the Court below, have contended that the decree founded on that judgment is bad, because in the part referring it to the Registrar to settle a lease in conformity with the agreement, the decree orders that such lease shall contain clauses and covenants in conformity with the terms of a letter, dated the 3rd of August, 1863, and with the terms of the inclosed Memorandum, which it may be convenient to call the additional Memorandum, the effect of which two documents is to impose on the lessor, first, the duty of doing the substantial repairs to the premises during the term; and, secondly, the duty of allowing to the lessees (the Defendants) £300, being the seventh quarter's rent, in consideration of the insufficient manner in which the house (No. 3) has been finished.

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The case is complicated, and the Appellants raised many points, which resolve themselves into five, two of form, two of substance, besides the objection to the decree, as above mentioned. Of these in their order. The two points of form, viz., that the lease to Messrs. *Provand* was void because there was no seal, and that the suit ought to fail by reason of the delay in commencing it, were shewn in the course of the argument to be untenable, and when that was clearly proved it was admitted by the Defendants. The two points of substance related, the first to the supposed vagueness of the Memorandum of agreement of the 27th of April, 1863, and the second, to the non-performance by the Plaintiffs of their duty under that agreement. The remaining objection was to part of the decree.

With respect to the supposed vagueness of the Memorandum of agreement, their Lordships propose to consider what is the true construction of that Memorandum, having regard to the terms of the instrument and to the surrounding circumstances, and also, in reference to this suit for specific performance, to the conduct of the parties in the interval between the making of the agreement and the commencement of the suit.

This contract operates by way of mutual agreement. The Plaintiffs below agree to transfer the residue of a term in certain premises, and to build or finish houses thereon, and to proceed with the building at once, and to consult the Defendants' wishes in finishing the houses then being built and in building the house then not commenced. The Defendants below agree to take the term so to be transferred, and to pay a rent of £4,000 per annum, divided into three portions, the liability for each portion to begin from the time when the house to which that portion relates is finished by the Plaintiffs, and delivered by them into the possession of the Defendants. Both parties further agree that a proper contract shall be drawn for them to execute by a Solicitor named by them.

In their Lordships' opinion the terms of this Memorandum of agreement, taken by themselves, clearly express the intentions of the parties. The contract bound, from the moment it was made, the respective parties to do the acts which each was to perform, in the order which is to be collected therefrom. The stipulation that

a proper contract should be made by a legal adviser is isolated from the other stipulations in point of sequence, and might have been performed either directly after the Memorandum had been signed, or when possession was given of the first house (as expressly provided in the proposal of the 21st of April, which led to the agreement of the 27th), or at any subsequent time either before or after the completion of all or any of the houses. By the Memorandum all the essentials to the relation between lessor and lessee are ascertained, viz., the interest in the term is bound by the signature of the parties to the memorandum, and the duration of the term, the amount of rent, the time for taking possession of the respective portions, and the time from whence the rent should begin to accrue due, are clearly stated. The stipulation for a proper contract is usual where the parties make the agreement in their own language for a transfer of an interest in land in the performance of which technical skill is wanted. The legal adviser chosen by the parties (or in case of suit, the Registrar) has to express in detail what are the legal and usual provisions in such a case in respect of repairs and rates and taxes, and to settle whether the mode of transfer shall be by assignment or underlease.

The duties arising by law from the relation either between lessor and lessee, or between assignor and assignee of a lease, may be modified according to usage, and the named referee, or his substitute, or the Registrar, has to express the detail of that which is involved, according to legal implication, in the more general terms of the memorandum.

So far their Lordships have considered the terms of the contract itself. They now refer to the surrounding circumstances. The leases to the Messrs. *Provand,* the Plaintiffs, with a plan of the premises, were shewn to the Messrs. *Oxford,* the Defendants, before they made the agreement of the 27th of April, 1863. If the interest of the Plaintiffs thereunder was assigned to the Defendants as Assignees, the Defendants would be subject to all the terms in those leases which according to law would run with the land; but if the mode of transfer should be by underlease instead of assignment, the terms of the underlease would, in usual course, be analogous to those in the lease transferred, subject to modifications according to legal usage in respect of any alteration of the build-

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ings after the grant of the lease to be transferred. In the present case, the parties added the stipulation, that the Plaintiffs should consult the wishes of the Defendants in completing the buildings which were to be built.

It has been objected that this part of the agreement relating to consulting the wishes of the Defendants in making the buildings is so vague, that specific performance of the other part of the agreement relating to making a proper contract cannot be enforced. But to this objection there are two answers, by which the vagueness complained of, if it had existed, would have been removed, first, by reference to the surrounding circumstances; and secondly, by reason of the part execution by the Plaintiffs of the duties to be performed on their part. The circumstances shew that the part of the contract relating to building had as much certainty as an ordinary building contract admits of. As to the house No. 1 on the plan, it was an agreement for the delivery of a specific thing agreed on between the parties. That house had not been injured by the fire, and the Plaintiffs did not contract to alter it; but the Defendants chose to alter it for their own purposes by their own builder, to the detriment both of the building and of the interest of the lessor, and they are not entitled to take any advantage therefrom. As to the two houses in course of building, Nos. 2 and 4, the Defendants, before they made the agreement of the 27th April, 1863, saw the plans and specifications, and building contracts for the houses, and made their agreement by reference thereto, with the additional stipulation that their wishes should be consulted in the course of the building. The plans and specifications for these two houses defined, with as much precision as the subject is capable of, the dimensions, materials, and workmanship which the builder was bound to supply. As to one of them, the Defendants substituted another plan. Both houses were completed, as the Plaintiffs allege, according to these plans, with opportunities for the Defendants constantly to inspect the work, by themselves and by their architect, as it went on. Their wishes the Plaintiffs were bound to consult. Those wishes were expressed in many of the letters which have been produced; but the greater part of these letters ought to be distinguished from complaints of breach of contract, as they are querulous letters, not unusual in building

operations, expressive of the wishes of the party in the performance of the work. The rent of the two houses, Nos. 2 and 4, as well as of the house No. 1, was to become due from the time when such houses respectively should have been delivered as finished according to contract by the Plaintiffs to the Defendants, and accepted by the Defendants accordingly. All the three houses were so accepted by the Defendants, and rent was paid for them for several quarters; and Nos. 2 and 4 were sub-let to lessees, who would have continued to occupy them if the Defendants had not interfered to induce them to leave. As to these three houses, the Plaintiffs' contract was sufficiently certain as it was made, and if there had been ground for doubt, it would have been removed by performance. If the Appellants supposed that the Builder's contract, with a precise specification, could be at all affected by implications from the fashion which prevailed among other Merchants of *Shanghai* in respect of the houses they chose to inhabit, such supposition was a mistake. Each contract for a house is singular, and must be construed without reference to other contracts for other houses, unless it contains terms of reference thereto. Upon these facts their Lordships consider that as to these three houses the objections of the Defendants (the present Appellants) fail, both in respect of the supposed vagueness of the contract, and in respect of the supposed non-performance thereof by the Plaintiffs.

Then with respect to the remaining house, No. 3 on the plan, for the Defendants' own occupation, the same objection, viz., that a promise to consult the Defendants' wishes in the building and finishing thereof was so vague as to be a bar to any suit for specific performance of another part of the agreement, although wholly distinct therefrom, was more strongly pressed on their Lordships' attention; but the force of the objection disappears when the surrounding circumstances relevant to that stipulation are reviewed. By the letter of the 21st of April, 1863, the Defendants make the proposal to take the transfer which led to the agreement of the 27th; and in this letter they state the dimensions of the house they wish for, and propose to hand a plan to the Plaintiffs, and offer an addition of £500 per annum to the rent if the Plaintiffs will undertake the building thereof. It is clear that this proposal for the house No. 3, was agreed to and became part of the contract

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of the 27th of April, the rent being £4,000 instead of £3,500 as at first proposed. It further appears by the evidence of Mr. *Provand* that Messrs. *Oxford* handed to the Plaintiffs a plan for the house No. 3; and although the time when they so furnished it is not mentioned, it is almost self-evident that the Builder must have seen the plan before he contracted to execute it at a certain price. The Defendants inspected the building thereof, and had the aid of an Architect to advise, as the work went on; and in this way the meaning of the parties in stipulating that the wishes of Messrs. *Oxford* should be consulted in the building of the house is made apparent by their performance of that stipulation. It appears also, from the same evidence, that the house was built according to Messrs. *Oxford's* plan, although there are many letters complaining that joiners', plasterers', and locksmiths' work was not as good as Messrs. *Oxford* wished and had a right to expect; but of this more hereafter. Their Lordships are now considering whether Messrs. *Oxford* are well-founded in asserting that the contract was so vague in respect of building that a stipulation in it unconnected with building cannot be enforced, although the building has been either performed or nearly performed.

The contract and the circumstances relevant thereto being as above explained, their Lordships do not stop to inquire whether a suit for specific performance of the stipulation for a "proper contract" could have been maintained at once; but having regard to that which had been done before the suit was commenced, they consider that there was not such uncertainty as to be a bar to this suit.

The second point relied on for the Appellants (the Defendants in the original suit) was an allegation that the Plaintiffs had so far failed in the performance of the promises on their part to be performed before October, 1865 (the date of the commencement of this suit), that the Court below ought to have refused to assist them by decreeing a specific performance of the stipulation for executing "a proper contract;" and they referred to the principle that a party seeking equity must do equity.

They contend that the conduct of the Plaintiffs in respect of the contract has given them a right to treat the contract as annulled thereby, and to repudiate the transfer of the Plaintiffs' interest.

The Defendants seek under this pretext to release themselves from the payment of a rent amounting altogether to nearly £50,000, and to compel the Plaintiffs to resume possession of the premises in their altered state. The Plaintiffs would thus become liable to their lessors, upon the leases which they contracted to assign, to pay rent exceeding £20,000; and are to be liable also for damages for alterations made by the Defendants, contrary to the contract between the Plaintiffs and their lessors, as well as for loss by deterioration of premises by reason of desertion, and for all rates and taxes. And besides these direct pecuniary losses, the Plaintiffs are to resume possession, when the market is low, of houses which they agreed to assign when the market was high. This formidable loss Messrs. *Oxford* claim to inflict on Messrs. *Provand* because, as it is alleged, they failed to do equity to the extent of laying out about £1,000 in plasterers', joiners', and locksmiths' work; and this work, as far as it could be claimed under the building contract, Messrs. *Provand* offered to do if Messrs. *Oxford* would execute an underlease. But as Messrs. *Oxford* claimed to annul the agreement altogether, and to throw back the premises upon the lessor, without any right for so doing, they in a manner prevented Messrs. *Provand* from going on to fulfil their contract till the question thus wrongfully raised by Messrs. *Oxford* was determined; and under these circumstances Messrs. *Oxford* cannot take advantage of their own wrong; that is, of the non-completion of the house No. 3, caused by their own wrong. Their Lordships assume that the claim of Messrs. *Oxford* to annul the agreement of the 27th of April, 1865, is altogether untenable.

It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties, and their respective interests under the contract, are to be remembered. In reviewing the evidence on this point, the Court must be careful to distinguish between evidence of opinion and evidence of facts. If a party has an interest in depreciating a building, it is not difficult to obtain opinions that it is unfinished, uninhabitable, untenantable, and so forth. But the Court must endeavour to ascertain the real facts; and it seems a very cogent fact in this case that the balance of the evidence

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establishes that the whole premises could have been put into complete order, according to the construction of the contract most unfavourable to the Plaintiffs, by an outlay of £1,000.

Then, if the Court examines the conduct of the parties in respect of each of the four houses which the Defendants claim to throw back on the Plaintiffs' hands, the equity of the Defendants' contention will be better appreciated. As to the proceedings in relation to the houses Nos. 1, 2, and 4, their Lordships have already expressed their opinion. In the house No. 3, which was occupied by the Defendants before it was finished, for their own convenience, and in which the work went on for more than a year in their presence, and with the knowledge of their Architect, the plasterers' and joiners' and locksmiths' work was not so good as in some other houses; but the building was required without delay; much building was going on, and good workmen and good materials were not to be had. The agreement to allow £300 for these, perhaps, inevitable defects, which was to be laid out by the Defendants themselves, was accepted by the Defendants, but was not so laid out according to the understanding of both parties; and the process of making good these defects was going on when the Defendants, in January, 1865, claimed to throw back the premises on the Plaintiffs' hands, and to put an end to the agreement of the 27th of April, 1863. Messrs. *Oxford* had furnished the plan (which in the ordinary course of business would mean specification); they saw the materials and the workmanship, and if completion was delayed it would have been an inconvenience to them. The justice of Messrs. *Oxford's* objections to the locks, bolts, &c., may be estimated by the fact to be inferred from the correspondence that Messrs. *Provand* got the best articles which *Shanghai* afforded; that, on Messrs. *Oxford's* objections to these, they sent to *England* for better articles (the arrival of which was delayed because it was necessary to have them made expressly for this service); and that the substitution of these articles was promised as soon as the mail should arrive. The house was delivered by Messrs. *Provand* as finished, and although Messrs. *Oxford* protested against admitting that it was finished, they kept the house, and paid rent for it several times.

Upon this state of facts the Court below did not find that the

Plaintiffs had forfeited by their own default the usual right of a party to a contract to a decree in equity for specific performance, and their Lordships see no reason for dissenting from the conclusion of the Court below on this point.

In support of their appeal the Defendants objected to the decree of the Court below, because it directed that the underlease should contain a clause in conformity with the Defendants' letter to Mr. *Lawrence*, of the 3rd of August, 1863, which says: "Lessor agrees to repair any damage arising from the act of God, or faulty construction of walls, roofs, and beams, and lessee to repair damages arising from any other cause than the above;" and also in conformity with the terms of a memorandum sent by the Defendants to Mr. *Lawrence*, which was as follows:—"Regarding the house occupied by Messrs. *Oxford & Co.*, it has been in addition agreed that the floors are to be kept in good order by the lessors during the term of contract, and that, in consideration of the insufficient manner in which this house has been finished, Messrs. *Oxford & Co.* are to retain the rent for this house for the first quarter in the third year of this lease towards renewing and repairing the fittings —£300, from the 1st of January to the 1st of April, 1867."

The Memorandum or agreement of the 27th of April, 1863, contains, in the words "a proper contract to be made," a stipulation entirely separate from the other stipulations, which are made to be inter-dependent on each other, as above fully explained.

For the specific performance of this stipulation the Court ought to ascertain what was the "proper contract" which the parties intended. If Mr. *Cooper* settled it according to legal usage, there would be no doubt. If Mr. *Cooper* declined to act, and the parties agreed to another Solicitor, he might settle the same question. But whether Mr. *Cooper* or Mr. *Lawrence* acted, if the two parties concurred in settling what they considered to be a proper contract according to legal usage, it would be reasonable for the Solicitor who acted as arbiter between them both to adopt their consent if he saw nothing improper therein. Now, the letter of the 3rd of August, 1863, purports only to embody the construction which the parties finally and by consent put upon their respective obligations to repair—obligations which were implied in the original contract whereof a specific performance was sought, but of which the extent

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and meaning had been the subject of the dispute before Mr. *Cooper*. Their Lordships are, therefore, of opinion that there is no error in that part of the decree which directs that the lease shall contain clauses and covenants in conformity with the terms of this letter.

The objection taken to the incorporation in the lease of the terms of the second Memorandum is more formidable. In considering it their Lordships will assume, for the sake of argument, that the paper was sufficiently proved to have been written about January, 1864, by Mr. *Arnhold*, one of the Defendants (who appears, however, to have had no opportunity of explaining it); and that it was intended not to be a mere proposal, as suggested by Sir *Roundell Palmer*, but to express, so far as it went, a concluded agreement between the parties. If the Plaintiffs relied on that agreement as a variation or modification of the original contract, it is clear that, according to the uniform course of Courts of Equity, and every sound principle, they ought to have pleaded it as such, and thus to have put on the record the whole of the subsisting contract which they meant to prove, and of which they sought the performance. On the other hand, if it is to be treated as an independent agreement by which the parties have fixed the compensation to be made by the Plaintiffs to the Defendants for the defective finishing of one of the houses (and this their Lordships think is the reasonable construction of the document), it is no part of the contract upon which the lease is founded, and ought not to be incorporated in that document.

In dealing with it as he has done, the learned Chief Justice probably considered that it was equitable to give to the Defendants the benefit of the stipulations concerning the repairs of the floors, and the allowance of the £300 by which the Plaintiffs had admitted themselves to be bound. It is to be observed, however, that the Defendants do not ask to have the benefit of this agreement. On the contrary, they, as their Lordships understand, object to have it forced upon them as a settlement of what is at most only a portion of their counterclaim against the Plaintiffs in respect of the defective construction or fittings of the houses. The decree does not purport to determine all the questions thus pending between the parties. The Chief Justice himself, in his judgment,

seems to assume that the Defendants may bring some other proceedings for the recovery of whatever compensation may be due to them for the defective completion of the houses, in so far as their claim was not covered by this agreement touching house No. 3. And this being so, their Lordships are of opinion that the proper course is to leave the Plaintiffs to get the benefit of this Memorandum, which was never properly put in issue in this suit, in any such proceeding as may hereafter be taken, by pleading it by way of accord and satisfaction to the whole or part of the Defendants' demand; and that the decree under appeal should be amended by striking out the passage which relates to it. Their Lordships have reluctantly come to this conclusion, since the objection, which is independent of the merits of the case, seems hardly to have been in the contemplation of the Appellants when they began their appeal.

It remains to consider the case of *Tildersley* v. *Clarkson* (1), which was pressed on our attention as a strong authority in support of the Appellants' case, in which a suit for specific performance of an agreement to take a lease was decided adversely to the Plaintiff. But the relevancy of that case to the present depends on the similarity of the two agreements and the two alleged defaults in the two cases.

There the agreement related to the accepting of a lease of one nearly-finished house, upon the terms as to covenants usual upon the estate where the house was situate, and the promise to accept such lease was, in effect, upon condition that the house should be finished, and a day was fixed for the delivery of the finished house into possession, and for the beginning of the term.

Here the agreement relates to the transfer of an existing term for fourteen years, in land, on which there were various buildings, some built, some to be built, with three different times for going into possession (that is to say, of becoming liable for the rent of three different portions), and no day was specified for the delivery of either house or the finishing of the work.

There the possession by the Defendant as between him and the Plaintiff was in law, none, because the entry of the Defendant had been produced by a false representation of the finished state of the

(1) 30 Beav. 419.

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premises made by the Appellants. Here the voluntary possession by the Defendants had been long, and their acts of ownership numerous, as above described.

There the lessor would be restored to his former situation. Here that was rendered impossible by the acts of the Appellants.

The surface of *Tildersley* v. *Clarkson* (1) wears a semblance of support of the Appellants; but the principle of that case, if we understand it aright, is decisive for the Respondents.

The meaning of the maxim in Chancery that he who seeks equity must do equity, is not clear, because equity has not been clearly defined. The maxim, as their Lordships understand it, includes the rule at law which in all suits upon contracts, either for specific performance or for damages, guides to discriminate whether an alleged breach of the duty of the Plaintiff under the contract is a bar to the suit.

The rule has been expressed in various forms, the substance of it, as regards the present purpose, is, that such breach is a bar when it goes to the whole of the consideration for the promise sued on; but when it amounts only to a partial failure of such consideration, it is no bar to the suit: the Defendant being entitled to recover in a cross action compensation for such failure, if it should be proved to exist.

This rule has been of frequent application at law, as appears by the numerous decisions cited in the note to *Cutter* v. *Powel* (2), in 2 *Smith's* Leading Cases, pp. 13, 14; see also 1 *Williams' Saunders*, p. 320, *c*, *d*, *e*, note to *Pordage* v. *Cole*.

The judgment of the Master of the Rolls in *Tildersley* v. *Clarkson*, shewing, with minute and elaborate search into the facts, that the alleged breach of duty on the part of the Plaintiff there went to the whole consideration for the Defendant's promise, and the judgment of *Hornby*, C.J., in the present case, shewing that the alleged breach of duty under the contract on the part of the Plaintiffs, if it could be proved to exist, amounted at most to a partial failure of consideration, for which compensation in damages might be claimed, are each of them founded on this rule, well known in Courts of Law, though neither of the Judges referred to it in the language used in the Courts of Law.

(1) 30 Beav. 419. (2) 6 Term Rep. 320.

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Their Lordships will, therefore, humbly recommend to Her Majesty that the decree of the Court below be amended by striking out the clause beginning with the words, "and with the terms of a Memorandum," and ending with the word "fittings," and that, with that variation, it be affirmed. Each party must bear his costs of this appeal.

Solicitors for the Appellants: *Thomas & Hollams.*
Solicitor for the Respondents: *T. W. Nelson.*

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HOWARD GILL . . . . . APPELLANT;

AND

ANDREW BARRON AND ALEXANDER ALLAN RATTRAY . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF COMMON PLEAS AT BARBADOES.

Barbadoes Insolvent Debtors Act, No. 234, *of* 1846—*Adjudication of Bankruptcy in England—Certificate—Statute,* 12 *&* 13 *Vict. c.* 106, *s.* 200—*Fraud—Jurisdiction of Colonial Court to commit Insolvent notwithstanding English certificate.*

Although an adjudication in Bankruptcy, followed by a certificate of discharge in *England* under the Bankrupt Laws, has the effect of barring any debt which the Bankrupt may have contracted in any part of the world, and of putting an end to any claim; such proceedings do not supersede the authority of the Court at *Barbadoes* to inquire into frauds and offences committed against the law of Insolvent Debtors in that Island, in a proceeding had there previous to the adjudication of Bankruptcy in *England*, the Insolvent having again placed himself within the jurisdiction of that Court.

G., a trader in the Island of *Barbadoes*, having left the Island in embarrassed and suspicious circumstances, was, under the Island Act, No. 234, of 1846, adjudicated an Insolvent, and his estate and effects administered under that Act. *G.* afterwards came to *England*, and was adjudicated a Bankrupt for a debt contracted in *England*, and obtained a certificate of conformity under the Imperial Statute, 12 & 13 Vict. c. 106, s. 200, discharging him from all debts due by him when he became a Bankrupt. *G.* returned to *Barbadoes*, when the Court there, before whom the original proceedings in Insolvency were had, at the instance of the opposing Creditors, sentenced him, under the Island

* *Present:*—LORD ROMILLY (MASTER OF THE ROLLS), SIR FITZ-ROY KELLY (LORD CHIEF BARON OF THE EXCHEQUER), SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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Insolvent Act, to eighteen months' imprisonment for fraud committed against the provisions of that Act :—

Held (affirming the Order of the Court), that the Insolvent Court of *Barbadoes* having acquired jurisdiction in the first instance in the matter of the Insolvency retained such jurisdiction, so as to render *G.* on his return amenable to that Court for fraudulent acts committed by him, and the sentence passed on him confirmed.

THIS was an appeal from Order of the Court of Common Pleas in the Island of *Barbadoes*, exercising jurisdiction in matters of Insolvency under the Acts of the Island, Nos. 234 and 332 of 1846, whereby the Appellant was ordered to be imprisoned in the common gaol for a period of eighteen months (1).

The Appellant had for many years previous to the year 1856 carried on business in *Barbadoes* as a Trader and Merchant, having dealings as such with persons resident in *England*. In the month of July in that year he left *Barbadoes* for *England*.

At that time it appeared he was indebted to the extent of £50,000. On the 29th of April, 1857, the Appellant was declared an Insolvent Trader at *Barbadoes*, within the *Island Act*, No. 234, of 1846, and a prosecution of Insolvency was directed by the Chief

(1) The section of the Act, No. 234, of 1846, empowering the Court to give such a sentence, is as follows :—

20. And be it enacted, "That in case it shall appear to the said Court that such Insolvent shall have contracted any debt fraudulently, or by means of a breach of trust, or by means of false pretence, or without having had any reasonable or probable expectation at the time when he contracted it for paying the same, or shall have lived extravagantly and beyond his proper means, or shall have fraudulently, or by means of any false pretence, obtained the forbearance of any debt by any of his Creditors, or shall have lost by gambling, within six months previous to his Insolvency, the sum of £50 sterling or upwards, or shall have put any of his creditors to any unnecessary expense by any vexatious or frivolous defence or delay to any suit for recovering any debt or sum of money due from such Insolvent, or shall have kept, or caused to be kept, any false Book or Books, or made, or caused to be made, any false entry or entries, or withheld, or caused to be withheld, any entry or entries from, or wilfully altered or falsified or caused to be altered or falsified, any Book or Books, papers or writings ; or that such Insolvent has fraudulently, with intent to diminish the sum to be divided among his Creditors, or to give an undue preference to any of the said Creditors, discharged or concealed any debt due to or from the said Insolvent, or made away with, charged, mortgaged, or concealed any part of his property of what kind soever ; then it shall be lawful for the Court to order such Insolvent to be imprisoned in the common gaol for a period not exceeding two years, as the Court shall direct, to be computed from the date of such order, and to be discharged from his debts after the expiration of such imprisonment."

Justice against him, whereupon the real and personal estate and effects of the Appellant became vested in the Official Assignee at *Barbadoes*. The Appellant having left a duly constituted Attorney to represent him, the Official Assignee forthwith applied to him for information. In answer to such application, it appeared that the Attorney was totally unacquainted with the Appellant's affairs, that the Appellant had left no Books or papers with him, and that he did not know the extent of the Appellant's assets. The Official Assignee having obtained the keys of the Appellant's desks at his counting house, found them filled with papers in a state of confusion; no arrangement whatever; and no Books of any description from which information respecting his business transactions or state of his affairs could be gathered, nor from which any correct account could be furnished against any person indebted to him for advances on produce or otherwise. In order to obtain information as to the Appellant's affairs, the Official Assignee examined several witnesses, and ascertained that the Appellant had been carrying on an extensive business in the Island, drawing Bills of Exchange on one Merchant in *Liverpool* alone in the course of eight months, from the 27th of December, 1853, to the 26th of August, 1854, for no less a sum than £37,857. It was further ascertained from Mr. *Reid*, who had been the Appellant's Clerk for twelve years, that the Appellant had kept no regular Books; that his accounts had been made out by reference to the stumps of the cheque books; that the balances due from and to parties, and the prices of produce, &c., were furnished by the Appellant to him from private memoranda kept in small Books in pockets or drawers; but the Appellant's Attorney was unable to say what had become of such small Books. Mr. *Outtram*, another of the witnesses examined by the Official Assignee, who was one of the Trustees of the Will of the Rev. *J. Braithwaite* (the father of the Appellant's wife), deposed that from information received by the Appellant by the Mail on the 6th of May, 1857, he had caused an entry to be made in the Books of the Rev. *J. Braithwaite's* estates of two execution debts (one for $2,000, and the other for £8,000 sterling) as due from the estate to the Trustees of the Appellant's marriage settlement.

On the 30th of November, 1857, the Official Assignee made his first report, and, after stating the result of his inquiries, reported

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with respect to the execution debt of £8,000 sterling, that the Rev. *C. C. Gill*, the Trustee of the Appellant's marriage settlement, since deceased, declared that he was not aware of the existence of such execution debt in his favour, and that he had never had any accounting with the Rev. *J. Braithwaite*, and the Official Assignee further stated his belief that the Appellant, "no doubt being well aware that he was in Insolvent circumstances at the time, and had been so since the year 1847, wished, by making over the £8,000, and also certain property known as *Hastings House* and land, to the Trustees, to put them out of the reach of his Creditors, and to ensure a future provision for his family." He added: "As far as I can learn, his liabilities at the present moment are £40,000. From the absence of all Books, I cannot tell when the various debts were incurred, but the probability is that they are, most of them, previous to 1853, when he got his father-in-law to settle the amount due to him upon his daughter, and that in reality he paid off no debts, but was shifting them from the shoulders of one party to the other."

On the 3rd of May, 1858, the Official Assignee made his second report, wherein, among other things, he stated "numerous claims and proofs have been filed since my last report, which, with those already reported, make the liabilities to date amount to £48,897 10*s.*; among these are two debts said to be owing to the estate of the Rev. *J. Braithwaite*, deceased. One is put in by the Executor and Executrix, including transactions prior to his death; the other by the Trustees, under his Will, comprising debts and credits since his death." The Official Assignee further stated that Mr. *Pitcher*, the Accountant who posted *Braithwaite's* Books, had, upon examination, admitted "that no entry of any lien against the estates was made until May, 1857, when he made it by Mr. *Outtram's* request, from memoranda put out by Mr. *Howard Gill*, the Appellant."

On the 28th of November, 1859, the Official Assignee made his third report, and stated "that the accounts proved by the Executors and Trustees of the Rev. *J. Braithwaite* for the respective sums of $11,491·5 and $1,179·50 have been withdrawn, the parties acknowledging them to be incorrect. Great difficulty, "having been experienced in dealing with the judgment debt of £8,000, which had been confessed by the Rev. *J. Braithwaite* to Mr. *Gill's*

Trustee under his marriage settlement," the matter was referred to the arbitration of the Attorney and Solicitor-General, who, by their decision, brought "the estate of the Rev. *J. Braithwaite* in debt for the sum of $25,202·25, instead of Mr. *Gill* being in debt $12,671."

On the 9th of September, 1859, the Official Assignee filed a Bill in Chancery against *C. C. Gill*, the Trustee of the Appellant's marriage settlement, to set aside the conveyance of *Hastings House* and land, and by a decree made in that suit, dated the 30th of March, 1860, it was declared that the conveyance for the place called *Hastings House*, with the land thereto belonging, was fraudulent and void against the Creditors of the Appellant, and ordered to be cancelled; and a decree was made that a conveyance of the estate should be executed to the Official Assignee for the benefit of the Appellant's creditors.

Previously to the declaration of Insolvency in *Barbadoes*, and in the month of December, 1856, the Appellant then being in *London*, called upon the Respondents, and stated that there were several Bills of Exchange, which had been drawn upon him, which he was unable to meet, but that he expected remittances from *Barbadoes*, which had not arrived. The Appellant at the same time asked the Respondents to take up the Bills, and promised to pay them the money on the 5th of January, 1857. The Respondents thereupon took up two of the Bills, and gave in cash £325 for them, and they gave their acceptances to the Appellant at thirty days for, and so as to cover the remaining Bills. The Bills were not met by the Appellant at maturity, and the Respondents had to retire them.

The Respondents brought an action against the Appellant in the Court of Exchequer in *England* to recover the amount due to them in respect of the Bills so taken up by them, and obtained judgment therein for £1,043 13*s.* 9½*d.* principal and interest.

On the 2nd of April, 1857, the Appellant was arrested for a debt due by him in *England* to one *Trollope Montefiore* and committed to the Queen's Prison, and whilst there received information that he had been declared an Insolvent Trader in the Island of *Barbadoes*.

On the 9th of September, 1857, the Appellant was adjudged

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Bankrupt in the Court of Bankruptcy in *London*, under the *Bankruptcy Law Consolidation Act*, 1849, upon the petition of one *Hall*, as Indorsee for value, and holder of an overdue Bill of Exchange accepted by the Appellant, payable in *London*.

The Appellant applied to the Court of Bankruptcy in *London* for his discharge from custody; his application was opposed by the Respondents and by *Montefiori*, and the further consideration thereof was adjourned to enable the Respondent, *Rattray*, to present a petition to annul the adjudication of Bankruptcy, on the ground that the alleged debt due to *Hall* was collusive, and that the Appellant was not a Trader within the meaning of the law relating to Bankrupts, and that the debts of the Appellant to the Respondents and to other persons had been fraudulently contracted by the Appellant.

On the 28th of October, 1857, upon the application of the Appellant, the Court of Bankruptcy ordered his release from prison at the suit of the Respondents and the other detaining Creditors, when *Outtram*, a Creditor of the Appellant for £995, was chosen by the Appellant's Creditors, including the Respondents, Assignee of the estate and effects of the Appellant, and on the 16th of August, 1862, a certificate of conformity of the third class, under the *Bankrupt Law Consolidation Act*, 1849, was granted by Mr. Commissioner *Fane* to the Appellant.

On the 2nd of January, 1865, (the Appellant having returned to *Barbadoes*,) an application was made to the Chief Justice to fix a day for his final examination, under the Insolvency, and the 31st of January, 1865, was fixed accordingly. The Respondents gave notice to the Appellant that it was their intention to oppose his final discharge, and filed nine allegations, of which the fifth was subsequently withdrawn. The Appellant filed an affidavit, verifying the certificate of discharge granted to him by the English Court of Bankruptcy.

The Appellant appeared and objected to the jurisdiction of the Court, submitting that the certificate of discharge of the English Bankruptcy Court ousted such jurisdiction, but the Chief Justice, (*B. Boucher Clarke*,) ruled the contrary, and examined the Appellant and other witnesses in the matter of the Insolvency, the effect of which is stated in the judgment of the Chief Justice.

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On the 7th of February, 1865, the Chief Justice gave judgment, the material part of which was in these terms:—He observed that, "Before the filing of the allegations under consideration, the Court of Bankruptcy in *England* granted the Appellant a certificate of conformity. This he produced in Court, in order to found on it an objection to any proceeding by this Court with the allegations, contending that the Court here was by the certificate deprived of all jurisdiction with respect to his Insolvency. As," continued the Chief Justice, "I felt no doubt on the point, I allowed the allegations to be proceeded with, stating that, it being a new question, I would reconsider it, and give my decision on a future day; and that if I should alter my opinion the Insolvent should have the benefit of it. The first inquiry then is, what is this certificate? It is granted under the authority of the 198th and other clauses of the 12 & 13 Vict. c. 106, and is of the third class. The 200th clause of this Statute 'discharges the Bankrupt from all debts due by him when he became a Bankrupt, and from all claims and demands made proveable under the Bankruptcy;' that is the Bankruptcy in *England.* This is the extent of its effect; and it may be conceded that if there had not been any adjudication here, constituting him an Insolvent Trader under the provisions of the *Insolvent Traders Act* of this Island, prior to the proceedings taken in *England* to make him a Bankrupt there, the certificate would have been a good plea in bar to an action brought against him in this Island for any debt proveable against him under the Bankruptcy in *England.* But the fact being, that, before any such proceedings were had in *England,* he had been duly and legally adjudged to be an insolvent Trader in *Barbadoes,* the questions to be decided are: What is the effect of such an adjudication here?—and is the Court here ousted of its jurisdiction over the Insolvent by reason of his having, subsequent to such adjudication, been made a Bankrupt in *England,* and obtained from the Court of Bankruptcy there the certificate of conformity which he produced? It was not, and could not have been contended that there was any error in the proceedings making him an Insolvent here. The immediate effect of the fiat of Insolvency issued against any trader is thus set forth in the Act, No. 234, of 1846, the 7th clause of which enacts:—'That from and immediately after any such adjudication of Insolvency, pur-

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suant to the provisions of this Act, the real and personal estates and effects of every such Insolvent Trader shall, without any assignment whatever, vest in the Official Assignee, for the benefit of all and every the creditors of such Insolvent; to be held and disposed of for the purpose, and according to the true intent and meaning, of this Act.' The 10th clause directs that all the Books, papers, and vouchers of the Insolvent, together with a schedule of his debts, and a balance sheet, shall be lodged in the office of the Official Assignee within fifteen days of the adjudication; which, so far as seemed possible at the time, was done. Thus, all his estate, and all the means of dealing with him as a Trader, were by the fiat placed within the power of this Court; he had, in fact, become subject to its jurisdiction, and, therefore, to all the clauses of the law giving authority to the Court to deal with him and with his property before any proceedings had been instituted to make him a Bankrupt in *England*. From April, then, to September, 1857, the Court of this Colony had sole and unquestioned jurisdiction under the law in the matter of this Insolvency. The question next arises, how did the Court here, and at what time, lose this jurisdiction? It is surely incumbent on the party asserting this loss to prove it. And, perhaps, I ought to have called on the Insolvent to raise this question in some more formal way; but as this could only have led to delay and expense, and no objection was made by the Counsel for the Creditors, it is as well to decide it in the manner in which it has been brought before the Court. It was first contended that the Court here and the Court of Bankruptcy in *England* have a concurrent jurisdiction; if by this is merely meant that in both Courts there is a jurisdiction in matters of Insolvency, this is correct: but if it be intended, as was argued, to affirm that they have a concurrent jurisdiction in the same suits, whether the act of Bankruptcy be committed in this Colony or in *England*, it is an error. For each Court is the creation of the legislative authority of its own country; each is independent of the other. The Insolvent Court of *Barbadoes* has for *Barbadoes* as absolute and independent power to deal with Insolvency arising in *Barbadoes*, according to the provisions of the law in force here, as the Court of Bankruptcy in *England* has with regard to Bankruptcies arising there, according to the Acts of Parliament relating

to Bankrupts. There is no authority in the Court of Bankruptcy in *England* to set aside, supervise, or interfere with the proceedings of the Insolvent Court here; it cannot deprive any Creditor of an Insolvent, against whom a fiat has issued in this Colony, of the rights which are incident to the proof of his debt, or prevent his availing himself of any of the provisions of the Act applicable to his case. The only Court having jurisdiction over the decisions of the Courts here, is the Judicial Committee of the Privy Council, on an appeal regularly made. Next, no Act of the Imperial Parliament has been shewn by which a power is vested in the Court of Bankruptcy in *England* to take, by virtue of its certificate, from a Colonial Court of Insolvency its jurisdiction over an Insolvent after he has been regularly adjudged to be an Insolvent, nor does any such Act exist that I am aware of. Is there, it may next be inquired, any decision in any of the English Courts shewing that such a power has ever been claimed or exercised with reference to any Colonial Court? No such case was cited at the Bar, nor am I aware of there being any such. There are, however, cases in which a similar question has been decided in *England* with reference to Scotch sequestrations; and as the Scotch Act of sequestration is on the same general principle as the *Barbadoes* fiat of Insolvency, namely, that of passing all the property of the Bankrupt to the Assignees for the benefit of his Creditors, they may be consulted as safe guides for the decision of this point in this case. In *Ex parte Cridland* (1) the Lord Chancellor said: 'Two cases have occurred in *Scotland*, one in the Bankruptcy of *Stein & Co.* (2), decided by the Court of Session, and considered in a late case in the House of Lords, whose opinion was, and justly, that where the English Commission precedes the sequestration, all the Scotch personal estate would pass under that Commission' (as it did under the abjudication of Insolvency here with regard equally to the real and personal estate), 'therefore they could not, under the sequestration, administer the Scotch personal property; and, probably, the converse would hold.' His Lordship also stated in that case, that 'he had no concern with a Commission in *Ireland* (3);' adding, 'that if the Irish Commission is the right of the

(1) 3 V. & B. 99. (2) 1 Rose, 462.
(3) 1 Rose, 101.

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subject, and duly issued, how could he supersede it?' The point, however, seems to have been decided, that the prior Commission, as between *Scotland* and *England*, shall have the preference. The case of *Geddes* v. *Mowat* (1), is thus cited in a Treatise of authority on the Law of Bankruptcy.—'Where a sequestration in *Scotland* was awarded against a party domiciled there, and a Commission of Bankruptcy was issued against the same party, by reason of his having removed to and committed an act of Bankruptcy in *England*, the sequestration was held to have the preference, as it was applied for before the issuing of the Commission.' Again, in *Geddes' Case* (1) it was decided that a Scotch sequestration has priority, if the fiat in *England* issue after deliverance pronounced on a petition for a Scotch sequestration, or the Trader come to *England* for the purpose of having a fiat issued. In the case of this Insolvent, the adjudication against him was made in *Barbadoes* in April, and it was not till the month of September following that he was thrown into the Bankruptcy Court in *England*. These decisions, therefore, afford no slight authority for the conclusion at which I have arrived—that this Court's jurisdiction over the Insolvent has not been taken from it by the proceedings in the Court of Bankruptcy in *England*, or by the certificate obtained there. Looking next to the terms of the certificate, there is nothing which could lead to the inference contended for, that it ousted this Court of its jurisdiction. It relates to the debts of the Bankrupt, and it might, as I have before remarked, have been a good plea in bar in an action of debt, if this had simply been a case in which a party being in *England* had been made a Bankrupt there before he returned to this Colony, and was adjudicated an Insolvent. But it by no means follows that, even under those circumstances, the jurisdiction of this Court would have been ousted, for then the position of the two Courts would have been reversed; the property here would have been subject to the English Court, and this Court would have been as powerless as the English Court was in all matters save one; and that the very one which it is attempted by this motion to take now from the cognizance of this Court, viz., the conduct of the Insolvent; for the question of granting a certificate is a question of conduct. No claim was ever made by the

(1) 1 Gl. & J. 414.

Court in *England* to interfere with the proceedings here, of which it was well aware; or to deal with the property of the Insolvent, which it knew was by law vested in the Official Assignee here; it dealt only with what was within its power—the Bankrupt himself. In like manner, the Court here has hitherto dealt with what was its reach—the Insolvent's property; and I am at a loss to know what there is, now that he has voluntarily placed himself within its jurisdiction, to prevent its dealing with his person. If he is subject to any one clause of the Act, he is subject to all, unless he can shew a special and sufficient exemption. This he has failed to do; it is not to be found in any Act of Parliament or local law; it does not exist in the Court of Bankruptcy in *England*, nor in its certificate, for that relates solely to debts; and the question raised and argued is one of jurisdiction, the avowed object of the motion made being—to free the Insolvent from the authority of this Court, in respect to the penalties of the Law of Insolvency here. There are one or two points with respect to the certificate itself which must be considered. First, as to the mode in which it is produced before the Court; and secondly, as to the means by which it was obtained. With regard to the first point, I have already stated the reasons for allowing the question it was intended to raise to be argued simply on its production; but as the effect of the certificate and the exemption it gives is wholly statutory, so is the mode in which the party must avail himself of it; and this is pointed out by the 205th section of the Statute, 12 & 13 Vict. c. 106. It must be done either by plea or motion; and if by plea, the form given by the Act must be adopted. In *Gowland* v. *Warren* (1), it was held that the certificate must be specially pleaded, and could not be given in evidence under the general issue; Lord *Ellenborough* stating that 'Bankruptcy in the Defendant does not shew that the Plaintiff never had any cause of action, or that his demand has been cut down. The debt still exists, and the certificate only operates as a special discharge from it, under the Statute. The party, therefore, can avail himself of this discharge only in such manner as the Statute has provided.' This shews that the certificate can only be made available by being pleaded in the manner prescribed by the Act; that its effect is confined to the debts of

(1) 1 Camp. 363.

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the Bankrupt, and that it has no other operation; it cannot, therefore, be held to oust this Court of its authority, acquired prior to the Bankruptcy in *England*, to deal with the Insolvent and his property under the Act of this Colony. Secondly, as to the means by which it was maintained. The Insolvent, on his examination before this Court, proved that the adjudication of Bankruptcy against him in *England* was obtained by fraud and false swearing, to which he was himself a party; for he swore that one *Parker*, who was a fellow prisoner with him in the Queen's Prison, was the person who appeared as petitioning creditor; that the debt he deposed to was on a Bill of Exchange given by him to *Parker;* that there was no consideration for this Bill, there being no debt due by him to *Parker;* and that it was on this fictitious debt that he was made a Bankrupt, and the proceedings carried on against him, by means of which he ultimately obtained the certificate he produced in support of the motion for his discharge. Now, the 201st section of the Statute, 12 & 13 Vict. c. 106, provides 'that no Bankrupt shall be entitled to a certificate of conformity under this Act, and any certificate, if allowed, shall be void' . . . 'if any person having proved a false debt under the Bankruptcy, such Bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his Assignees within one month after such knowledge.' This section, therefore, on his own evidence, not only disentitled the Bankrupt to receive a certificate, but, even where he has succeeded in obtaining it under such circumstances, renders it void. The words of the Act are, 'having proved a false debt under the Act,' and they must apply to all debts which are proved as debts of the Bankrupt; and, *à fortiori*, to the most important of those debts, that of the petitioning Creditor. The Insolvent, therefore, has himself proved that, under this section of the Statute, the certificate is void and of none effect. But setting aside this section, and assuming that there was no enactment to that effect, it is clear, and was so decided in the case of *Horn* v. *Ion* (1), that it is a good answer to a plea of Bankruptcy, that the certificate was obtained by fraud, 'on the general principle that fraud vitiates all contracts and instruments.' In the case of *Vincent* v. *Brady* (2), where a certificated Bankrupt was arrested for a

(1) 4 B. & Ad. 78. (2) 2 H. Bla. 1.

debt due before his Bankruptcy, and obtained a rule to shew cause why he should not be discharged out of custody on entering a common appearance in pursuance of the Statute, affidavits were received and read on shewing cause that the certificate was obtained by fraud, one of which was made by the Defendant himself in another cause, setting forth the fraudulent means by which the certificate was obtained; and 'the Court were clearly of opinion that the Defendant was not entitled to his discharge, as it plainly appeared, from his own affidavit, that the certificate was obtained by fraud.' The fraud proved by the Insolvent in this case affects every proceeding in the Court of Bankruptcy in *England*, for it lies at the base of the suit, the adjudication being founded on a fictitious debt, falsely sworn with the knowledge and by the contrivance of the Insolvent to be a true one; the object manifestly being to pass through the Court there, and obtain the certificate produced, in the hope that it would be a bar to the jurisdiction of this Court. Lastly, it is impossible not to see the evils which such a construction of the effect, even of a valid certificate, would lead, if it were allowed by the Court. As soon as a Trader was made an Insolvent in a Colony, if he felt that he was not entitled to a certificate there, he might betake himself to *England*, and by means of the facilities which it would seem exist in the Court there, obtain a certificate, and return discharged from his debts, and freed from the jurisdiction of the Court of the place of his trading and domicile, where alone existed the evidence necessary to shew the true facts of his Insolvency. This is no imaginary evil. It is on his own shewing that the Insolvent contrived by means of fraud, and with the help of the false oath of another, to give the Court in *England* jurisdiction to declare him a Bankrupt there; and that he thus obtained his certificate; and he has not hesitated, in order to obtain what he supposes to be the benefit of such certificate in this Court, to swear falsely in the affidavit he made in support of it, that 'I was, on the petition of a Creditor in *England*, made a bankrupt there.' Upon the grounds, and for the reasons given, I have come to the conclusion that the certificate produced by the Insolvent, if valid, can in no degree deprive this Court of its jurisdiction over the Insolvent. I am of opinion that such certificate has been fraudulently obtained, and is void under the Statute, as

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well as on the general principle applicable to all fraudulent documents. I am also of opinion that this Court had primary, and now retains full jurisdiction to deal with the Insolvent according to the law of the Colony relating to Insolvent Traders" (1). Upon the merits he found that six out of the nine allegations filed by the Respondents were proved, which six allegations were as follows:— Second, that the Insolvent's Books were not kept in a clear and correct matter, so as to enable his creditors to obtain a complete knowledge of the state of his affairs, although his debts exceeded £500. Third, that a full and proper balance sheet and schedule had not been lodged by the Insolvent in the office of the Official Assignee. Fourth, that the Insolvent contracted the debt of the Respondents without having any reasonable or probable expectation at the time when he contracted it of paying the same. Sixth, that the Insolvent fraudulently, and with intent to diminish the sum to be divided among his creditors, purchased and paid for a place called *Hastings House*, the conveyance of which he caused to be drawn in the name of the Rev. *C. C. Gill*, the surviving trustee under the settlement executed previously to his marriage with his wife; seventh, that the Insolvent fraudulently, and with intent to diminish the sum to be divided among his creditors, caused the Rev. *J. Braithwaite*, on the 9th of September, 1853, to confess judgment to *C. C. Gill*, as such Trustee, in the sum of £8,000 sterling, with interest, upon the trusts of the settlement, the sum of £8,000 being due from *Braithwaite* to the Insolvent; and eighth, that the Insolvent contracted a debt with the estate of the Rev. *J. Braithwaite*, under whose will he was a trustee, fraudulently and by means of a breach of trust, and the Chief Justice concluded his judgment as follows:—"I wish I could see one redeeming feature in any one of the transactions brought to light, but taking them altogether I should be wanting in my duty, however painful, if I hesitated to say that the Insolvent had brought himself within more than one of the penal clauses of the Act, and

(1) NOTE.—Since this decision was given the case of *Ex parte Gibson, Re Patrick* has been decided (on the 18th of March) by the Lord Chancellor. It is sufficiently similar in its circumstances to the case of the Insolvent to induce me to call attention to it, though subsequent to the decision I felt it my duty to give. *See* 1 Bar. Rep. 101.

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that it is my duty to sentence him to such a measure of its penalties as I think his conduct deserves. It has been stated that the Insolvent has already suffered about six months' imprisonment for debt in *England;* I will give him the benefit of that period of incarceration, and instead of two years, I direct him to be imprisoned in the common gaol for eighteen months."

The Appellant having given notice of appeal to the Judicial Committee of the Privy Council, the Chief Justice directed that he should be detained in custody until he should have given a sufficient Bond to prosecute his appeal, to pay the costs thereon, and to appear and surrender himself in execution of the judgment of the Court. The Appellant and another having executed a Bond, appealed to Her Majesty in Council from the above judgment.

J. C.* 1866 *June* 13.

The Appellant subsequently presented a petition to the Queen in Council, to be allowed at the hearing of the appeal to refer to the proceedings in Bankruptcy in the Court in *London*, but such application being opposed, their Lordships directed that the petition should stand over until the hearing of the appeal, when they could refer, if necessary, to the proceedings in Bankruptcy.

The appeal now came on for hearing.

Mr. *H. W. Lord*, for the Appellant:—

First: I contend that the petition upon which the proceedings in Insolvency in the Court at *Barbadoes* were founded did not comply with the requirements of the 2nd section of the Island Act, No. 234, of 1846. [The LORD CHIEF BARON:—Can you open that question? No appeal has been made from the Order of the Court made on that petition.] If your Lordships think that as no appeal was presented from that Order we cannot now object to it, that ground of argument of course fails. But, secondly; the Appellant contends that the jurisdiction of the Court of Common Pleas in *Barbadoes* over him was taken away by the proceedings against him in the Court of Bankruptcy in *England*, and the certificate granted by that Court was a bar to any further proceeding in the Court at

* *Present:*—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHAN WILLIAMS.

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Barbadoes. [The LORD CHIEF BARON:—Then you contend, as a proposition of law, that the certificate of the Bankruptcy Court in *England* puts an end to the jurisdiction of the Colonial Court in the Insolvency?] Yes; that is my argument. The certificate of conformity having been granted in *England* under the Act of the Imperial Legislature, 12 & 13 Vict. c. 106, s. 200, protected the person of the Appellant from proceedings under the penal clause, sect. 20 of the *Barbadoes Insolvent Act*, No. 234, of 1846, in respect to debts which accrued previous to the date of the adjudication in *England*: *Edwards* v. *Roland* (1). There it was held, that a certificate of conformity obtained under a commission of Bankruptcy in *England*, was a bar to an action for debt contracted in *Calcutta* previously to the Bankruptcy, although the Creditor had no notice of the commission and was resident in *Calcutta*. Here the debts having been extinguished by the English certificate, the criminal charge can no longer be sustained. The debts were proveable under the English Bankruptcy. The Respondents having obtained judgment upon the Bills of Exchange before the proceedings in Bankruptcy in *England*, and having elected not to prove the judgment debt under those proceedings; and having interfered by opposing the discharge of the Appellant from custody, and by proving their other judgment debt; ought not to have been allowed to have been heard to oppose the final discharge of the Appellant under the Insolvent proceedings in *Barbadoes*. The Appellant was proceeded against in the Court of Bankruptcy for the same offences for which he has been sentenced to imprisonment by the Court in *Barbadoes*, but taking into consideration that the only opposing Creditors in *Barbadoes* were the Respondents, who also were parties to the proceedings in *England*, he ought not to have been so sentenced. Lastly: it is submitted that the allegations held by the Court below as having been proved against the Appellant, were not established by the evidence adduced in support of them, but assuming that all or any of these allegations were proved, the Order inflicts a punishment upon the Appellant which is unduly severe, and disproportioned to the offence.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Respondents, were not called upon.

(1) 1 Knapp's P. C. Cases, 259.

Their Lordships' judgment was delivered by

THE LORD CHIEF BARON:—

Their Lordships do not think it necessary to trouble the Respondents' Counsel in this case.

It appears that the Appellant has been convicted before the Court of Insolvent Debtors, or rather the Court of Common Pleas, possessing jurisdiction as an Insolvent Debtor's Court in the Island of *Barbadoes*, upon what, for the purposes of this case, we may refer to as four distinct charges of fraud or misconduct within the Act of Parliament passed in respect of Insolvent Debtors in the Island, and has been sentenced to eighteen months' imprisonment. Against this judgment he now appeals to Her Majesty in Council, and the question is, whether either on the technical grounds of law—for they are purely technical—which have been urged in his favour, and urged with considerable ability, by the learned Counsel who has appeared before us, or upon the substantial merits of the case, he is entitled to maintain this appeal?

It appears that the case, which is of a somewhat extraordinary character, is as follows: The Appellant, being a trader, and having been engaged in extensive mercantile transactions in this Island as long back as the year 1857, quitted *Barbadoes*, after having disposed of his property in a way hereafter to be referred to, leaving his Books and his accounts in a state of the greatest confusion, and also leaving a number of debts unpaid, and consequently a great number of unsatisfied creditors. He appears to have proceeded to *England*, and there certain proceedings took place to which hereafter reference will be made. The Appellant having quitted the Island, his creditors proceeded to take steps under what may be called the *Insolvent Debtors Act* in force there, and on the 29th of April, 1857, upon what is called a petition in Insolvency, he was adjudicated an Insolvent, and was placed within the jurisdiction of the Court in *Barbadoes*. Every effort was made to realize the property. Proceedings took place from time to time, as well as the Insolvent Court and its Officers were able to resort to proceedings, in order to inquire into the state of his affairs and to realize his effects. Something resulted from this, for it seems that some dividend has been declared, but he was found to be, sub-

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stantially speaking, without Books of account. It was impossible from the Books that were found to ascertain the true state of his affairs, and nothing could be learnt concerning them but from a number of scraps of paper and memoranda and accounts of a very uncertain and irregular character which were found in his house or in his office. The result was, that though something was realized, nothing satisfactory could be done under these proceedings in Insolvency. In the meantime, it seems he had come to *England* as early as the year 1856, and that in the year 1857, having contracted a debt, he was sued and taken in execution and thrown into prison. He remained in prison for about six months. During that imprisonment, and in order to obtain his liberation, he seems to have resorted, and with success, to some course of proceeding under the Bankruptcy Laws of this Country. Their Lordships have no very distinct evidence, except from his own statement, as to what the real nature and real merits of the proceeding in question were; but certainly he himself admits that the adjudication proceeded upon a fictitious debt, alleged to have existed between himself and a person of the name of *Parker*. It does appear, however, that a person bearing another name, claiming a debt of £53, was the petitioning creditor, and the result at last was, that he obtained his discharge, on the 28th of October in the same year, 1857; and some five years afterwards, under circumstances which are not fully before us, he succeeded in obtaining a certificate, which no doubt discharged him from his debts. Afterwards, having returned to *Barbadoes*, and being found in that Island, his creditors very naturally resorted to such proceedings as they were enabled to resort to, according to the law of Insolvent debtors in that Colony, and in January, 1865, a motion was made to restore his name to the list of Insolvents, and a day was then fixed for his final examination. The notice was given to himself, and the creditors proceeded to make the charge which has led to this conviction, and to the sentence against which he now appeals. The whole matter came on to be heard, and was heard during several days. Witnesses were examined, and he himself was examined, at considerable length, as well as witnesses on his behalf, and the whole matter of these various charges appears to have been fully, and their Lordships are of opinion fairly, and according to law,

investigated and considered by the Court in *Barbadoes*. He was found guilty, and conviction was pronounced upon four of those charges to which we are now about to advert, and he was sentenced accordingly to eighteen months' imprisonment on account of the frauds and misconduct of which he was thus found guilty. The sentence would have been the most severe that the law allows—that is to say, two years' imprisonment—but as he had suffered an imprisonment of six months in *England*, the Court was pleased to reduce the term to eighteen months, and accordingly to eighteen months' imprisonment in the jail at *Barbadoes* the Appellant has been sentenced.

He now appeals against that judgment and sentence, and substantially it is upon two grounds. It was, indeed, rather suggested than seriously argued, that from the beginning the Court of *Barbadoes* had no jurisdiction, though certainly the petition of Insolvency appears to be rather informal in its terms and in its character; but upon that petition, which does substantially, though not formally or very explicitly, disclose enough to give the Court jurisdiction, the Court pronounced an order or decree of Insolvency, and from that time to this their jurisdiction and the decree itself have never been questioned, and this appeal is not, in terms at least, directed against that decree. Their Lordships, therefore, pass by that part of the case altogether.

But then it is contended that the proceedings in Bankruptcy in this Country, under an Act of the Imperial Legislature, the adjudication in Bankruptcy, and finally the certificate granted by the Commissioner in Bankruptcy in the year 1862, have the effect not only of discharging the Insolvent from the debts which he had contracted in *Barbadoes*—indeed, any debts to which he might be liable, contracted in any part of the world—but of superseding the authority of the Court in *Barbadoes* altogether, and depriving them of the jurisdiction which they had acquired under the adjudication in Insolvency in 1857, and of disabling them to proceed further in that matter, and, therefore, of course, to hear the complaint, and to pronounce the judgment and sentence against which this appeal has been brought. Now it is quite true that an adjudication in Bankruptcy, followed by a certificate of discharge in this Country under the Bankrupt laws passed by the Imperial Legislature, has

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the effect of barring any debt which the Bankrupt may have contracted in any part of the world, and it would have the effect of putting an end to any claims in the Island of *Barbadoes*, or elsewhere, to which the Appellant might have been liable at the date of the adjudication. There is, indeed, much to throw a deep shade of suspicion over these proceedings, but there they are, recorded according to law in this Country; there is the adjudication, and there is the certificate. The adjudication has never been suspended or annulled, the certificate remains in full force; and their Lordships do not, whatever may be their opinion of the circumstances under which the adjudication was originally obtained, feel themselves at liberty to treat the proceeding as otherwise than valid, and of full force as far as it can have any legal effect upon the debts or the proceedings in *Barbadoes*.

But then the question arises whether the effect of these proceedings in Bankruptcy in this Country can supersede the authority of the Court in *Barbadoes*, and deprive that Court of jurisdiction to inquire afterwards into frauds and offences committed against the law of Insolvent Debtors in that Island, when the Insolvent has returned and placed himself again within its jurisdiction; and their Lordships are of opinion that the proceedings in Bankruptcy in this Country have no such effect. The Court of Common Pleas, possessing jurisdiction in the matter of Insolvent Debtors in the Island of *Barbadoes*, having acquired jurisdiction over the whole matter in the year 1857 by the decree then pronounced, their jurisdiction continues, and continues unimpaired to this day, and in all time to come. It is quite true that the debts may be barred, so that the Court could not proceed to enforce the payment of those debts directly or indirectly as against the debtor, or in any other way; but although the debts may be irrecoverable, the jurisdiction of the Court to inquire into offences committed or alleged to have been committed against the law of Insolvent debtors in that country still continues. It is under that jurisdiction, and in a proceeding perfectly regular in all its forms and in all its stages, that the Insolvent, the now Appellant, has been called before the Court, and these four charges have been preferred against him, upon which four charges he has been convicted and subjected to the sentence in question.

All that now remains for their Lordships to consider is, whether the Court has done wrong, and, therefore, whether this appeal ought to be allowed upon the merits of the case in respect to these four charges, or any of them?

The first of those charges is, that the Insolvent had contracted a debt with the now Respondent without having any reasonable or probable expectation at the time when it was contracted of being able to pay it. Now, the learned Counsel for the Appellant has admitted, and he could not do otherwise, that in fact the charge is substantiated and true, and he only contends that the debt itself being extinguished by the proceedings in Bankruptcy in this country, the criminal charge can no longer be sustained. Their Lordships are of opinion that that is not so, but that the offence having been committed, it was only by an accident that upon this and the other charges he had not been arraigned and prosecuted to conviction in the Island. It was owing to his having departed from the Island, and thus wilfully and fraudulently evaded the process of the law, that he was not prosecuted for these offences at a much earlier period; but, as has been already observed, the jurisdiction of the Court still continuing, although the debt is cancelled, he still remains liable to the criminal charge, and upon that charge it is admitted that he has been properly convicted.

Passing over the fifth charge, which has been withdrawn, their Lordships now come to the sixth, which is in substance that, having purchased with his own money a house or property called *Hastings House*, instead of having the conveyance made to himself, which would have placed it within the reach of his creditors under this very proceeding by virtue of the *Insolvent Debtors Act*, he caused it to be conveyed to the Trustees of his marriage settlement, in effect for the benefit of some members of his family. Without going into what afterwards took place as to the sale, and other machinery with which the transaction became involved, it is perfectly clear that this was in itself a fraud within the express words of the *Insolvent Debtors Act* in *Barbadoes*, and that therefore he was properly convicted. He seeks to excuse himself in his examination by alleging that he was indebted to the Trustees, and that he had had £900 of their money. If that were so, that would not justify him, unless he had openly and regularly, in satisfaction of

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that debt, and not by way of fraudulent preference, expressly in consideration of that debt, conveyed the property in question to his Trustees. Then he says he purchased it very cheap, but it appears to have been worth considerably more than the £900 which he alleged he owed to the trustees. Its value is said to have been £3,000, and this property he withdraws and abstracts from his creditors, and conveys to these Trustees, and then runs away from the Island, leaving his Creditors without the means of obtaining satisfaction of their debts. This charge is, therefore, established.

The seventh charge presents a very simple and clear case of fraud in relation to *Hastings House*, and comes within the express words of the *Insolvent Debtors Act* of this Island. It appears that he prevailed upon the Rev. Mr. *Braithwaite*, a connection of his own, to suffer a judgment for a debt due or alleged to be due by *Braithwaite* to himself, not in his own name—which, of course, in the event of these proceedings having taken place, would have given to his Creditors the full benefit of that judgment, and put the £8,000 in their hands to be divided among the Creditors—but he causes the judgment to be suffered in the name and for the benefit of the Trustees under his marriage settlement, and for the benefit of his own family. He himself scarcely denies the fact. He seeks to say there were some transactions under which this might be justified; but, in truth, it is a very confused story which he tells, and the plain English of the whole appears to be this, that there being a debt due—for one cannot suppose that any Gentleman in his senses would have suffered a judgment to be entered up against him for this large sum of £8,000 unless he really owed the money in some way or other—this debt, represented by this judgment, is thus transferred into the hands of the Trustees under the marriage settlement, the judgment being suffered to them and in their names, the Trustee himself, who gave evidence in the case, knowing nothing about the transaction until he is informed that he has become possessed of this security for £8,000, on behalf of the family of the Insolvent. It is clear also that this charge is completely established.

Then, as to the eighth charge, that he contracted a debt to the estate of the same gentleman, the Rev. *John Braithwaite*, deceased,

under whose Will he was a Trustee, fraudulently and by means of a breach of trust,—that charge again, upon his own shewing, is substantiated. It appears that after the death of Mr. *Braithwaite*, the Insolvent and another person then in the Island of *Barbadoes* were co-trustees, and the Trustee in the Island remitted to the Appellant, who was then in *England*, the sum of £500, in order to pay a debt claimed by the Government on account of revenue, in respect of the estate of the deceased Mr. *Braithwaite*. He received the £500; he does not deny that. He goes on to say, "It may have been to pay this debt; it certainly was for the estate of Mr. *Braithwaite*, and I applied it to my own use." He pretends to justify that by saying he considered he was at liberty to do so, because he had lived with Mr. *Braithwaite*, or Mr. *Braithwaite* had lived with him. It is perfectly manifest that this sum of £500 was remitted to him to be applied in discharge of a debt due to the Crown by the estate of Mr. *Braithwaite*, and that instead of doing his duty like an honest man and paying that debt, and so freeing the estate from the claim, he applied it to his own use.

All four of these charges, therefore, being completely substantiated, and there being no answer and no excuse that we can find in any part of these proceedings—even upon the statement of the Appellant himself,—it only remains for their Lordships humbly to advise Her Majesty to affirm the sentence of the Court of Common Pleas of *Barbadoes*, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Lawrance, Plews, & Boyer.*
Solicitor for the Respondents: *Charles Champion.*

J. C.* 1868 July 2, 3.

THOMAS JAMES WALLACE . . . . . APPELLANT;

AND

JOHN McSWEENY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT, HALIFAX, NOVA SCOTIA.

Nova Scotia Revised Statutes, part 3, *ch.* 134, *tit.* 36—*Foreclosure suit—Vexatious and frivolous pleas—Irregularity—Decree—Amendment of pleas.*

In a foreclosure suit, the Supreme Court, at *Halifax*, on motion, set aside the pleas of the Defendant as false, frivolous, and vexatious, and by the same Order directed the foreclosure of the equity of redemption. On appeal, such Order was held irregular and set aside, the Judicial Committee (without deciding the merits) being of opinion that, though the pleas were inconsistent, multifarious, and embarrassing, the Supreme Court was bound, by the provisions of the 62nd and 63rd sections of part 3, ch. 134, tit. 36, of the *Nova Scotia* Revised Statutes, in respect to amendment of pleadings; and the suit remitted back to the Court below, with liberty for the Defendant to apply to amend his pleas, or in default that the pleas should be set aside.

IN this case the appeal was brought from a judgment of the Supreme Court at *Halifax*, which confirmed an Order made by Mr. Justice *Wilkins*, in an action in the nature of a foreclosure suit, brought by the Respondent against the Appellant, whereby the Court set aside certain pleas as false and frivolous, and ordered the foreclosure of certain mortgaged premises.

The material facts were these:—

James Dunphy, Dean of a Roman Catholic Church at *Halifax*, *Nova Scotia*, but at the time of his death residing in *Ireland*, by his Will appointed *Patrick Dunphy*, the Appellant, and the Respondent, Executors and Trustees. After directing payment of debts and funeral expenses, he bequeathed to *Dunphy* and the Appellant the sum of £3,800, to be disposed of by them in accordance with a private letter of instructions directed by him to *Dunphy* and the Appellant, such bequest being a private trust to *Dunphy* and the Appellant. The Testator further bequeathed the residue of his estate and effects to his Executors, in trust to pay yearly the

* *Present*:—LORD ROMILLY, THE LORD CHIEF BARON (SIR FITZ-ROY KELLY), SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

sum of £100 to the support of a Roman Catholic School in the City of *St. John, New Brunswick,* and the yearly sum of £100 to the support of a Roman Catholic School in the Town of *Halifax, Nova Scotia;* and he further directed his Executors to collect the amounts due to him on certain mortgages, and apply the proceeds thereof to the payment of his legacies, and if the same were insufficient, then to raise the deficiency by sale of a portion of certain securities held by Testator, the remainder of securities to remain in the same investment as long as deemed expedient. There was no gift of the residue except in trust as aforesaid.

In consequence of differences arising between the Executors; the Respondent and *Dunphy,* in May, 1864, commenced a suit in the Equity side of the Supreme Court, *Nova Scotia,* against the Appellant, with regard to the execution of the trusts of the Will.

In the same month, a written agreement was entered into between the Respondent and *Dunphy,* and the Appellant, for the compromise of that suit, and after reciting that differences had arisen between the Executors touching the management of the estate, the control of the funds, and the construction of the Will, and that for settling the same the Appellant had agreed to relinquish the office of Trustee and Executor under the Will, and to release to the Respondent and *Dunphy* all his the Appellant's rights to any portion of the estate, and to pay over to them the sum of $16,000 in full of the money of the estate remaining in his hands, subject to certain deductions; and reciting that the Respondent and *Dunphy* had agreed to indemnify the Appellant from any liability under the Will, and all claims of the next of kin of the Testator or any other person claiming under the Will; it was witnessed, that the Respondent and *Dunphy,* in consideration of the sum of $16,000, subject to deductions as aforesaid, in hand, well and truly paid by the Appellant, the receipt whereof was thereby acknowledged, covenanted to discontinue the suit and indemnify the Appellant as aforesaid, and released the Appellant from all claims in respect of the estate, and the Appellant thereby relinquished the office of Executor and Trustee, and released the Respondent and *Dunphy* from all claims under the Will.

By an Indenture dated the 25th of May, 1864, the Appellant and his wife mortgaged certain premises situate in *Halifax, Nova*

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Scotia, to *Dunphy*, to secure the payment of the sum of $9,000 to be paid to *Dunphy* by the Appellant. By another indenture, bearing date the 20th of March, 1865, the Executors of *Dunphy*, then deceased, assigned the above mortgage to the Respondent.

In December, 1865, the Respondent brought a suit against the Appellant in the Supreme Court of *Nova Scotia*, by a writ of summons, claiming a sum of $9,000, with arrear of interest thereon, to be due from the Appellant to the Respondent for principal and interest on the above mortgage, and in default of payment of the principal money and interest, the Respondent prayed that the equity of redemption in the premises comprised in the mortgage might be foreclosed, and a sale of the premises made, and out of the proceeds of such sale the amount due on the mortgage, with interest and costs, paid to the Respondent.

The Appellant pleaded the following pleas:—First, that the Indenture of mortgage was not his deed. Second, that the Indenture of mortgage was executed voluntarily without consideration, as the Plaintiff well knew before he took an assignment thereof. Third, that the Plaintiff gave no consideration for the assignment. Fourth, that when the mortgage was executed, it was agreed by the Mortgagee, as part of the consideration thereof, and as a condition precedent to the payment of the $9,000, to obtain for the Defendant releases from the next of kin of *Dunphy*, the Testator, and to indemnify the Defendant before the $9,000 secured by the mortgage could be demanded; that no such releases had been procured or tendered; and that the Plaintiff was cognisant of the agreement and condition precedent at the time the same were made and at the time of the assignment to him of the mortgage; and that the releases and indemnification aforesaid had never been given. Fifth, that the Plaintiff, and the Defendant, and *Patrick Dunphy*, were Executors of Dean *Dunphy's* Will; that the Defendant had obtained probate of the Will in *Ireland*, and had thereunder received moneys of the estate; that disputes had arisen between *Patrick Dunphy*, the Plaintiff, the Defendant, and some of the next of kin of the Testator, touching the moneys; that the Defendant had proposed to withdraw from the management of the estate, and to pay over to *Patrick Dunphy* and the Plaintiff for the estate, the sum of $16,000, upon condition that *Patrick Dunphy* and the Plaintiff

would indemnify the Defendant against the consequences of so withdrawing; and that the next of kin should release the Defendant from all further liability; that *Patrick Dunphy* and the Plaintiff agreed to these conditions, and that the Defendant, in part performance of the agreement, executed the mortgage upon the express condition that the indemnity, releases, and discharge should be given before the money secured by the mortgage should be called in; that these conditions had never been fulfilled; that the Defendant was willing to pay the amount secured by the mortgage upon these conditions being fulfilled; that the Plaintiff took the assignment of the mortgage with knowledge of the premises, yet that he was seeking to foreclose the mortgage and call in the money in violation of the agreement, and to leave the Defendant without indemnity against the claims of the next of kin, and with no means of the estate to meet them. Sixth, that the Defendant was, since the death of *Patrick Dunphy*, the only surviving Trustee under the Will of the Testator for the sum of £3,800, and that he was willing and agreed to leave the management of the estate and appropriation of the funds thereof to *Patrick Dunphy* during the term of *Patrick Dunphy's* life, and in pursuance of the agreement executed the mortgage to *Patrick Dunphy*, the money thereby secured being part of the trust money which came to the Appellant's hands as Trustee with *Patrick Dunphy;* that *Patrick Dunphy* died without having fulfilled the trusts of the Will, and the Appellant, as the only surviving Trustee, was entitled to resume and did resume the trusts, and was entitled to hold the moneys secured by the mortgage deed for the purposes of the trust; that the Plaintiff, at the time of the assignment, and at the commencement of the suit, well knew the above premises, and that the Indenture of mortgage ought to have been released and discharged, and the property therein mentioned reconveyed to the Appellant. Seventh, that the making of the mortgage was an improper disposition of the funds of the estate, and the mortgage was illegal and void. Eighth, that the money secured by the mortgage belonged to the estate of Dean *Dunphy*, and that the Plaintiff should have instituted the suit as one of the Executors of the estate, and not in his own name, without declaring the trusts for which he was bound to hold the mortgage. Ninth, that, upon

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the death of *Patrick Dunphy*, the Defendant was entitled to and resumed the executorship and trusteeship, under the Will of Dean *Dunphy*, and that the money secured by the mortgage formed part of the estate, and that the purpose for which the mortgage was given had not been carried out, as the Plaintiff knew at the time of the assignment, and that money secured by the mortgage ought to be treated as money of the estate, to be applied under the Will by the Plaintiff and the Defendant conjointly as co-Executors. Tenth, that the unpaid balance of the money secured by the mortgage on the death of *Patrick Dunphy* reverted to the Defendant alone as sole surviving Trustee, for the sum of £3,800, he having no other funds of the estate wherewith to satisfy that trust. Eleventh, that the Defendant was one of the Executors of Dean *Dunphy*, and the only one to whom probate was granted in the country of the Testator's domicile at his death; that the money secured by the mortgage was parcel of the estate of the Testator, received by the Defendant under the probate; that the Defendant was called upon to pay money for legacy and succession duty equal to the sum secured by the mortgage; that this was one of the demands against which the Defendant was entitled to be indemnified, as aforesaid, and against which he had not been indemnified, and that he had a right to retain the money secured by the mortgage to meet and indemnify himself against the claim. Twelfth, that the money secured by the mortgage belonged to the estate of Dean *Dunphy*, received by the Defendant as Executor, under probate granted to him alone in *Ireland;* that the Defendant had never renounced such probate; that the Defendant had been willing that the estate should be managed by *Patrick Dunphy* and the Plaintiff, and for this purpose he executed the mortgage upon the condition that *Patrick Dunphy* and the Plaintiff should indemnify him against all claims in respect of the estate, and that *Patrick Dunphy* died without having indemnified the Defendant and without settling the estate; that the Defendant being unwilling that the estate should be settled by the Plaintiff alone, resumed the management and settlement thereof as Executor and Trustee as aforesaid, as he had a right to do; that the premises were known to the Plaintiff when he took the assignment of the mortgage; and that the same, by reason of the premises, ought to be given up and

cancelled. Thirteenth, that the alleged Indenture of mortgage was given as and for an escrow until an event occurred which had not yet happened. Fourteenth, that the Plaintiff had possessed himself of a large sum of money belonging to the estate for which he had never accounted, and the Defendant having no confidence in the Plaintiff, in consequence of his not having accounted as aforesaid, was unwilling to hand over the funds of the estate secured by the mortgage to the Plaintiff alone, as, in case of misapplication of the funds, the Defendant would remain liable for the said moneys so misapplied as aforesaid.

The Respondent applied for and obtained a rule *nisi*, to set aside the pleas as false, frivolous, and vexatious, supporting such application by an affidavit of his Attorney. The Appellant made an affidavit in answer stating, that his pleas were not false or vexatious, but were true and correct, and set forth in detail the facts intended to be proved in support of the pleas.

The rule *nisi* came on to be heard before Mr. Justice *Wilkins*, who pronounced the following judgment:—"I am of opinion that the rule must be made absolute. I reject every statement made, the object of which is to deny or qualify the written agreement under seal executed by the late Rev. *Patrick Dunphy* and *McSweeny* of the one part, and by the Defendant of the other part. It is not denied that the mortgage in question formed a part of the $16,000 that were the consideration expressed in the agreement for the covenants therein contained on the part of the deceased and *McSweeny* to be performed. It is not denied that the mortgage was executed to the Rev. *Patrick Dunphy* for the benefit of the estate that he represented, and at his death his Executors assigned it to *McSweeny*, whom I must regard, from the language and spirit of the agreement, to have been when it was assigned to him the sole acting Executor of the Will of the late Dean *Dunphy*. If he is not in legal strictness and in every sense to be so regarded, it is, at least, not competent for this Defendant, having executed the agreement in question, to contend before me on this motion that he is to be viewed in any other light. The Defendant not only executed the agreement, relying on the covenants of *Dunphy* and *McSweeny*, but he executed this mortgage (viewed as a payment on account of the $16,000, or *pro tanto*) unconditionally,

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the agreement shewing conclusively that there were no conditions to be performed by the other party as precedent to their right to make the mortgage available for the benefit of the estate. The claim which the Defendant now makes to take part in the execution of the Will he did not reserve or notice in the articles under seal. His conduct in relation to the mortgage, and the sum secured by it after his execution of it, has been, on his own shewing, utterly inconsistent with his present contention, that payment of it cannot be enforced against him. It is utterly inconsistent also with his allegation that the articles in the agreement are imperfect and were not intended to be operative. What the Defendant urges now, in answer to the rule, he might have urged and should have insisted on at the execution of the articles, if he deemed it essential for his own security or for the interest of the estate that he represented. The pleas must be set aside, and the usual order for foreclosure and sale of the mortgage premises pass."

An Order of that date was thereupon made in the terms of the judgment.

The Appellant appealed therefrom to the Supreme Court.

After argument, the Chief Justice *Young*, on the 2nd of August, 1866, delivered the judgment of the Court, the material parts of which were in these terms:—"The question is, whether it is competent to the Defendant to raise the defences which are contained in his voluminous pleas. Now, we are all of opinion, that it is not competent for him to do so. The money in this mortgage is not his money: it belongs to the trust estate, and by our original decision ought to have been paid into this Court for the protection and safety of the Legatees and heirs to whom it really belongs. This was our judgment when the Defendant was still an Executor, *à fortiori* it is our judgment now, when he has ceased to be one. We beg to be understood, however, as giving no opinion whatever upon the right he now claims to resume the Executorship, and the management of the whole or any part of the estate. These questions, or any other, it is perfectly open to him to raise on a suit for that purpose. All we say is, that he has no business to raise them in this suit in the face of his agreement under seal. We will take care, however, that no injustice is done him. We are disposed to do more for him, in fact, than he did for himself. From the fact

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that the Plaintiff has the confidence of the Executors of *Patrick Dunphy*, and the natural guardians of the rights of their Church, and of the Legatees, we are satisfied that the Defendant runs no risk of being called upon for legacy duties or any other liabilities of the estate; but we will not expose him even to that remote risk. In granting the foreclosure, we will direct the proceeds to be paid to the Accountant-General, and out of these will see that all just demands are discharged. On this account, we think the want of the schedule of little moment. The want of it does not vitiate the agreement, and the contemplated deductions will be ascertained, and settled here, if not already paid. . . . It was urged that a motion to set aside pleas as false could not be made in a foreclosure suit; and if we were governed by the English practice, or the rules of an Equity Court, this objection would be fatal. But, by the 4th section of our Equity Act in all cases formerly determinable in Chancery, and now conducted in the Supreme Court, the practice of the Supreme Court, as far as it is applicable, shall be observed. And we hold it to be the practice of this Court, which experience has shewn within its legitimate bounds to be a wholesome and highly convenient practice, that a motion to set aside false and vexatious pleas will apply equally to a foreclosure as to a Common law suit. If, indeed, fraud had been alleged in the Defendant's pleas as tainting this mortgage or impeaching its consideration, we would probably have thought it right to remit it to a jury. If, again, the Defendant had ventured to deny that the mortgage was his, that is a question which we would not have tried on affidavits, but would have considered this summary jurisdiction as at an end. The Court then went on to say that the "reservations in the pleas on the face of the sealed instrument are not only in contradiction of the rules of evidence, but are contradictory of all the facts of the case. The main point of the execution of the mortgage is admitted. It is true that the Defendant, in his affidavit, says that he never made the mortgage set forth in the Plaintiff's declaration, nor any other mortgage, with interest, to the Rev. *Patrick Dunphy;* but this is only a subtilty which we regret to see in an affidavit, the mortgage having been set out in the declaration by mistake, as if it bore interest on the face of it, which it does not, and the denial applying only to the mort-

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gage as so pleaded, and not to the mortgage as it was in fact executed, and is now before us. Both on principle, then, and on the rules of practice, we are of opinion, that this appeal should be dismissed, and the Order for foreclosure and sale of the mortgage premises will pass with the direction we have intimated as to the proceeds."

It was, therefore, ordered that the Order made by Mr. Justice *Wilkins* be confirmed with costs, and that on the sale of the mortgaged premises the Sheriff was directed to pay the proceeds to the Accountant-General.

The appeal was from this Order of confirmation.

Sir *R. Palmer*, Q.C., and Mr. *Watkin Williams*, for the Appellant:—

In substance, though in the form of action, this is a foreclosure suit. No form of action is necessary to be stated in the writ or proceedings in *Nova Scotia*: Revised Statutes of *Nova Scotia*, ch. 134, tit. 36, sect. 2. First: the Orders appealed against are not in accordance with the principles or practice which ought to have been acted on by the Supreme Court sitting as a Court of Equity. It was not competent for that Court to decree an immediate foreclosure of the mortgage without directing an account to be taken of the amount due for principal or interest, and without giving the Appellant the opportunity of redeeming. The Supreme Court, however, had no power to set aside the pleas as false, frivolous, or vexatious, for even if they did not disclose a good defence to the suit, which we submit they did—if they were objected to as false, argumentative, or uncertain, to use the language of the Revised Statutes—the proper course would have been by application to a Judge to have such pleading amended under the provisions of the Statutes in force in *Nova Scotia* (1); and if colourably amended

(1) Revised Statutes of *Nova Scotia* 3rd series, part 3, ch. 134, tit. 36, sects. 61, 62 and 63, "Pleading and Practice." These sections are as follows:—

Sect. 61. "Except in the cases hereinafter particularly mentioned, no pleading shall be deemed insufficient for any defect now objectionable on special demurrer only.

62. "Duplicity, argumentativeness, and uncertainty, shall be no longer grounds of objection to a pleading, unless the effect of such duplicity, argumentativeness, or uncertainty, shall be to embarrass the opposite party; but if any pleading, by reason of duplicity, argumentativeness, or uncertainty, shall be so framed as to embarrass or mis-

the Judge has power to set aside the whole or any part of the pleadings (1). It is quite plain that there has been a miscarriage of justice; the Court could not set these pleas aside on motion, and the Orders of the Court below, being contrary to the right and justice of the case, cannot be upheld.

Mr. *Druce*, Q.C., and Mr. *Cohen*, for the Respondent:—

First: The question whether the Supreme Court ought to have set aside the pleas was one not to be decided by any fixed statutory rule, as contended for by the Appellant, but was one in which the Court was at liberty to exercise its discretion; the decision, therefore, of the Court below cannot be questioned, unless it appears, beyond a doubt, that the Court came to a wrong conclusion on the merits, or that injustice would be done by such Order as was made. The pleas are manifestly false, frivolous and bad, and, therefore, no practical injustice was done by setting them aside on motion, which, though the suit was one of foreclosure, the Chief Justice in his judgment says, was in accordance with the usual practice. Upon the merits: there was no evidence that the Indenture of mortgage was delivered as an escrow. By the defence sought to be set up, the Appellant attempted to vary by parol evidence the terms of the written agreement of May, 1864, and the mortgage. Now, the terms of that agreement clearly shew that the mortgage was not intended to be subject to any of the conditions set up in the pleas, and was

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lead the opposite party, it shall be competent to the latter to apply to a Judge to have such pleading amended, which application shall be by summons, wherein the party shall state the particular ground of objection, and require that the pleading be amended.

63. "Upon the hearing of such summons, if the Judge shall be of opinion that the objection is well founded, and that the pleading is, in the matter objected to, so pleaded as to embarrass or mislead the opposite party, he may order the party pleading to amend in such manner as he may direct upon payment of costs; and in the event of such amendment not being made within a limited time, the party complaining shall be at liberty to demur, but if the Judge shall not be of such opinion, he shall dismiss the summons with costs, and the party complaining shall have no further right of objection as to the point mentioned in the summons or as to any other point of duplicity, argumentativeness, or uncertainty."

(1) Ibid. sect. 71: "The Court or a Judge shall, in all cases, have power, on such terms as to costs or otherwise as they shall think fit, to set aside, in whole or in part, false, frivolous or vexatious pleadings, and pleadings colourably amended in pretended compliance with a Judge's order to amend."

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binding on all parties until set aside. Again, the Appellant is estopped, by reason of having paid $1,000 and having promised to pay the residue, from alleging the defences set up by his pleas. The Court, by directing the proceeds to be paid into Court, will take care that the Appellant be protected from the risks which are alleged in the pleas as the grounds for resisting the Respondent's claim.

THE LORD CHIEF BARON:—

In this case their Lordships are not called upon to pronounce any opinion upon the real merits of the cause. It appears that the Appellant and the Respondent, and another Gentleman, now deceased, were co-Executors and Trustees of a Roman Catholic Priest of the name of *Dunphy*, and various sums of money, part of the estate, having been collected, a portion of which were in the hands of the present Appellant, some dissatisfaction arose on the part of his co-Executors. This led to a suit which was instituted, and in which no doubt the present Appellant would have been held liable for the various sums of money that he had received on account of the estate, and would have been called upon to account for those moneys, and to pay them into Court, in order that the estate might be duly administered. But it seems before that suit was finally determined, the parties came together—the three Executors—and they entered into an agreement, the substance of which is in effect this, that the now Appellant was, so far as he lawfully could, to cease to be an Executor and Trustee; that he was to pay over, not the whole moneys which he had received, but, by way of compromise, the sum of $16,000, or thereabouts, to his two co-Executors, and that they were to undertake to indemnify him. In fact, by the agreement itself (had it been executed by all the parties) they would have covenanted to indemnify him against all claims, either by the next of kin or other parties beneficially interested, or Creditors, or all other persons in any way connected with this estate. The agreement was duly executed by the Appellant, but he appears not to have paid over the sum of $16,000 as contemplated by the agreement; but, either at the same time or within a day or two afterwards—certainly in the course of the same month of May—he appears to have executed

and delivered the mortgage now in question. Unfortunately, this agreement does not appear to have been executed by the two other parties, the co-Executors. They, therefore, received the mortgage. They had the agreement of the now Appellant, with his personal security and the instrument under seal itself, for the performance of his part of the contract; while he, on the other hand, had no security from them, except the mere fact that the other two parties had taken the benefit of this agreement, and had received not the money, but a mortgage to secure the payment of the money contracted for on the part of the now Appellant.

Such being the state of things, the Respondent, who had become sole Assignee of this mortgage by a subsequent conveyance, brings this action for a foreclosure of the mortgage; and it appears that under the rules by which the proceedings of the Court in *Nova Scotia* are regulated, though a suit for a foreclosure, it is in the form of an action at law, and that consequently the Plaintiff puts in his declaration, called a writ of summons, to which the Defendant, the now Appellant, is in due time called upon to plead. It seems that he failed to appear within the number of days required by the rules of the Court, and there was a judgment by default against him. That judgment was set aside, and he was subsequently let in to plead. In due time he pleads several pleas, which are before us in this record, and, undoubtedly, we feel bound to observe in relation to these pleas, that they are inconsistent, multifarious, and highly embarrassing, and we cannot doubt that if an application had been made to the Court under the 62nd and 63rd sections of the chapter relating to pleadings and practice in the Revised Statutes of *Nova Scotia*, the Court would have ordered these pleas to be set aside, unless the Defendant, the now Respondent, should have amended them so as to present his defence in a proper and intelligible form. But instead of that, it appears that the Respondent was advised to apply to the Court to set aside these pleas as false and frivolous, and the Court made an Order that they should be set aside as false and frivolous, and either by the same Order, or by some Order or decree immediately afterwards, decreed a foreclosure and the sale of the mortgaged premises.

Now, the question is whether this proceeding on the part of the Court is to be sustained? Their Lordships feel bound to abstain

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from offering any opinion whatever upon the merits of this case. Their Lordships do not say what may be, or what ought to be, the ultimate decision of the Supreme Court, but they think that this Order ought to be set aside and the judgment of that Court reversed, and the cause be remitted to the Court below, without prejudice to the right of the Plaintiff—that is, of the now Respondent—if he shall be so advised, to call upon the Defendant, the now Appellant, by rule to reform and amend his pleas, or, failing to do so, that the pleas should be set aside. It is with liberty to him so to apply, and without prejudice to his right to do so, that their Lordships will advise Her Majesty to reverse this decree; to remit the matter back to the Court below, for it to proceed in due course of law; and with regard to the costs, their Lordships direct that the Appellant shall have the costs of this appeal, but that all other costs will be in the discretion or subject to the adjudication according to law of the Court below.

Solicitors for the Appellants: *Hill, Son, & Heald.*
Solicitors for the Respondents: *Dawes & Sons.*

THE LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION COMPANY, LIMITED . . . . . } APPELLANTS;

AND

HENRY BENHAM AND OTHERS . . . . . RESPONDENTS.

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THE "HALLEY."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Shipping—Collision between a British and Foreign Vessel in Foreign Waters—Compulsory Pilotage—Tort committed in Foreign State—Damages—Suit in English Admiralty Court—Conflict of Law—Belgian Law—Lex Fori—Merchant Shipping Act, 1854.

In cases arising upon contracts entered into in a Foreign country, the Courts of *England* inquire into and act upon the law of Foreign countries where, by express reference, or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law becomes necessary to the construction of the contract itself. But in admitting the proof of Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts of the existence of a tort, an English Court applies and enforces its own law so far as it is applicable to the case established, but will not enforce a Foreign Municipal law, and give a remedy in the shape of damages, in respect of an act which by the English law imposes no liability on the person from whom the damage was claimed.

Thus in a cause of collision promoted by the owners of a Norwegian Barque, against a British Steamer, in the High Court of Admiralty in *England*, for damage done in Belgian waters, alleged to have been occasioned by the negligent and improper navigation of the steam-vessel, the owners of the Steamship pleaded, that the vessel was in charge of a Pilot whom they were compelled by the Belgian law to employ. The owners of the Barque replied, that by the Belgian law it is provided that the owners of a Ship which has done damage to another by collision are liable for the damage notwithstanding the vessel was in charge of a compulsory Pilot, and although the damage was occasioned by his negligence or want of skill. The owners of the Barque to this plea objected, that even if the article pleaded were true, they would not be liable in the Court of Admiralty in *England*. The Court of Admiralty admitted the plea of the Belgian law:—

Held, by the Judicial Committee, reversing the decision of the Court of Admiralty, that the claim being founded on a tort committed in the territory

* *Present:*—SIR WILLIAM ERLE, LORD JUSTICE WOOD, LORD JUSTICE SELWYN, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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of a Foreign State, the party claiming reparation in a British Court was not entitled to the benefit of the Foreign law against the admitted provisions of the Statute Law of *England*, and the practice of the High Court of Admiralty in respect of compulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English Court will enforce a Foreign Municipal law, and give a remedy in the shape of damage, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of *Smith* v. *Condry* (1) observed upon.

A CAUSE of damage promoted by the Respondents, the owners of the Norwegian Barque *Napoleon*, against a British Steamship, the *Halley*, for the recovery of damages by reason of a collision which took place between the *Napoleon* and the *Halley*, on the 20th of December, 1866, in *Flushing Roads*, in Belgian territory.

The Appellants, the owners of the *Halley*, by the eleventh article of their answer to the Respondents' petition, averred that, by the Belgian law which prevailed at the time and place of the collision, the *Halley* was compulsorily in charge of a duly appointed Pilot, whom the Appellants did not select and had no power of selecting; and by the twelfth and thirteenth articles they further alleged, that all the Pilot's orders were duly obeyed and complied with, and that if the collision was not the result of inevitable accident, it was exclusively occasioned by the negligence of the Pilot.

The Respondents, in their reply to the Appellants' answer, pleaded, by the third article, as follows:—"By the Belgian or Dutch laws in force at the time and place of the collision, the owners of a Ship which has done damage to another Ship by collision are liable to pay and make good to the owners of such lastly-mentioned Ship all losses occasioned to them by reason of such collision, notwithstanding that the Ship which has done such damage was at the time of the doing thereof being navigated under the direction, and in charge of a Pilot, duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such Pilot, without any contributory negligence on the part of the Master or Crew of such lastly-mentioned Ship; and

(1) 1 Howard's Rep. (U. S.) 28.

notwithstanding that it was at the time and place of the collision by the said laws compulsory on such lastly-mentioned ship to be navigated under the direction and in charge of such Pilot, and the Defendants, the owners of the *Halley*, are by virtue of the said laws liable to pay and make good to the Plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The Appellants moved the Court to strike out this third article on the ground that, though the article be true, they were not liable in the Court of Admiralty in *England*, when the Judge (Sir *Robert Phillimore*), on the 26th of November, 1867, gave judgment in which he held (1), that the Respondents were entitled to plead that the law of *Belgium*, within whose territorial waters their vessel received damage from the vessel of the Appellants, rendered them, although compelled to take a Pilot on board, liable to make reparation for the wrong she had done, and rejected the Appellants' motion (2).

From this judgment the present appeal was brought.

The *Solicitor-General* (Sir *W. Baliol Brett*, Q.C.), and Mr. *Cohen*, for the Appellants:—

The effect of the judgment of the Court below amounts to this, that in an action of tort, the tort being committed in a Foreign country in which a particular liability exists, an English Court of law will enforce that liability, and administer the Municipal law of a Foreign country in a cause of action which would not lie here. Now, that is a proposition which we maintain is wholly untenable. The law by which liability is determined in an action of tort is the *lex fori*: *The Maria* (3); *The Annapolis* (4); *The Vernon* (5); *The Ida* (6); *The Agricola* (7). No authority can be found to shew that there is a remedy here for a tort abroad which is not a tort here: *Savigny, System des RR.*, vol. viii. § 374. The remedy must be such as can be administered and enforced in the Court whose aid is invoked, and not the law and procedure of the Foreign country where the trespass has been com-

(1) Law Rep. 2 Ad. & E. 3.
(2) Ibid. 23.
(3) 1 W. Rob. 95.
(4) Lush. 295.
(5) 1 W. Rob. 316.
(6) Lush. 6.
(7) 2 W. Rob. 10.

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mitted: *Scott* v. *Lord Seymour* (1). An English Court of law will not entertain a cause of action arising in a Foreign country which would not lie here. Suppose that by the law of a Foreign country an insulting gesture, or defamation of an Official personage, is considered an assault, both of which are punished by fine or forfeiture, or again, until lately, by American law, in the Southern States, for harbouring a Slave; could an English Court administer here such remedy as is given by the Foreign law? It is absurd on the face of the proposition. It is true that an English Court will take notice of Foreign law in actions on contracts, the *lex loci contractus*, or the *lex loci solutionis*, being held to prevail solely with a view of carrying out the intention of the parties, and of putting a construction on the contract. But no such reason exists for applying the *lex loci delicti* in an action founded on tort or delict. There is no analogy between the cases. Here the English and not the Belgian law must prevail. In the case of *Simpson* v. *Fogo* (2) a British ship mortgaged in *England*, but remaining in possession of the Mortgagor, was attached in *New Orleans* by a Creditor of the Mortgagee. The Supreme Court of *Louisiana* refused to recognise the mortgage as being valid, as the law of *Louisiana* did not recognise a transfer of property in chattels without delivery of possession, but in a suit brought by the Mortgagee in *England*, it was held, that the judgment of the Supreme Court was examinable, and, being opposed to the principles of the law of *England*, could not be regarded.

A Court of Admiralty has no jurisdiction in collision cases except by Statute. It was originally an Instance Court. In cases of collision in inland waters the jurisdiction of the Court of Admiralty is only derived by the Statute, 24 Vict. c. 10, s. 7: *The Malvina* (3). It does not extend to Foreign waters: *The Ida* (4). The Respondents import the Belgian law for the damage occasioned by the Pilot, who was not their servant. They contend that by Belgian law the Appellants are liable for the Pilot's acts. The English law must govern the case. By that law a compulsory Pilot, who has a right to take command of the Ship, is not the

(1) 1 H. & C. 219. 9 Jur. N.S. 568 *Hunter*, Law Rep. 3 Ch. 479.
(2) 1 H. & M. 195. See also *The Liverpool Marine Credit Company* v. 9 Jur. N.S. 483
(3) 1 Moore's P. C. Cases (N. S.) 357.
(4) Lush. 6.

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servant of the Ship-owner; he cannot control him in the performance of his work, and, therefore, is not liable for the acts of a person he is compelled to employ. He is expressly exonerated by Statute, 17 & 18 Vict. c. 104, s. 388: *The Bilbao* (1); *The Maria* (2). The same principle is recognised by the Civil Code of *New York*, § 1280; *Story*, § 456, note; *Smith* v. *Condry* (3). The maxim "*qui facit per alium, facit per se*," therefore, does not apply, and any damage done by the collision by the Respondent's vessel is *damnum sine injuria*, the Pilot not being under the control of the Appellants. The wrongdoer was the Pilot, and as selection is a necessary condition to constitute the relation of master and servant, no person is answerable for a tort by another unless he has employed him: *Reedie* v. *The London and North Western Railway Company* (4); *Brown* v. *Mallett* (5); *Laugher* v. *Pointer* (6); *Milligan* v. *Wedge* (7); *The Mersey Docks Trustees* v. *Gibbs* (8).

The judgment of the Court below proceeds on the assumption that there was a maritime lien at the time of the collision, and that the doctrine enunciated in *The Bold Buccleugh* (9), that damage creates a lien on the ship causing the collision, applies; but in the case of *The Pacific* (10) it was held that under the 5th section of the *Admiralty Court Act*, 1861, material men acquire no maritime lien, only a right to sue the ship. Although there may be a maritime lien, yet the owner is liable to an action for damages, which sweeps away any lien: *The Amalia* (11). The argument derived from the Civil law regarding the *obligatio ex delicti*, so strongly urged and insisted on by the learned Judge in the Court below, has, in truth, no bearing in this case. The Court of Admiralty administers the law of Nations, or the Civil law, subject to the Municipal law of *England*, and has no power to enforce an obligation, which is not only not recognised or allowed by the Municipal law, but is expressly provided against by Statute, 17 & 18 Vict. c. 104, s. 388. The Belgian law sought to be imported by the third plea into the case has not, in fact, been

(1) Lush. 149.
(2) 1 W. Rob. 95.
(3) 1 Howard's Rep. (U. S.) 28.
(4) 4 Exch. 255.
(5) 5 C. B. 599.
(6) 5 B. & C. 553.
(7) 12 A. & E. 737.
(8) Law Rep. 1 H. L. 115.
(9) 7 Moore's P. C. Cases, 267.
(10) 1 Br. & Lush. 243.
(11) 1 Moore's P. C. Cases (N. S.) 484.

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violated by the Appellants; all they have done is to refuse to pay the damages. Upon all these grounds, we submit that the Respondent's remedy can only be in accordance with the *lex fori*, and that the case must be decided agreeably to the general maritime law as administered here: *The Hamburg* (1).

Mr. *Manisty*, Q.C., and Mr. *Clarkson*, for the Respondents:—

The real question is, whether the law of *England* or the law of *Belgium* governs the case. The learned Judge of the High Court of Admiralty has decided, as we maintain rightly, that the Belgian law is alone applicable. The case, no doubt, is one of tort, or, in the language of the Civil law, "*obligatio ex delicto*," and we contend must be determined by the law of *Belgium*, and not by the procedure of the Court here. Where the cause of action arises in a Foreign country, the *lex loci* governs the right, the *lex fori* the procedure: *Mostyn* v. *Fabrigas* (2); *Lammell* v. *Sewell* (3); *Huber* v. *Steiner* (4); *Castrique* v. *Imrie* (5); *Scott* v. *Lord Seymour* (6); *Rafael* v. *Verelst* (7). The American Courts adopt the same principle: *Smith* v. *Condry* (8), where it was held that if a collision occurs in an English port, the rights of the parties are governed and are to be determined by the provisions of English Statutes then in force. If this action had been brought in *Belgium*, no question would have arisen, and the Court ought to administer the same remedy as is given in that country. By the Civil law the Respondents have a right to be placed in the same condition they were before the wrong was done them. In other words, they were entitled to what the Civilians call "*restitutio in integrum*," and to have that reparation which the *lex loci commissi delicta* would have enforced: *Story*, Conflict of Laws, c. viii. §. 307, c. 14: *The Milford* (9). The *lex fori* in this case would be insufficient, and afford no remedy at all against the wrongdoers. Here the Pilotage is compulsory, but the owners are, in opposition to English law, by Belgian law, liable for the Pilot's acts. It is rightly observed

(1) Br. & Lush. 253; S. C. on appeal, 2 Moore's P. C. Cases (N. S.) 289.
(2) Cowp. 161. See 1 Smith's Lead. Cases, 523.
(3) 5 H. & N. 728.
(4) 2 Bing. N. C. 202.
(5) 8 C. B. (N. S.) 405.
(6) 32 L. J. (N. S.) (Exch.) 61.
(7) 2 W. Black. 983.
(8) 1 Howard's Rep. (U. S.) 28.
(9) Swab. 367.

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by the learned Judge in the Court below, that in the admission of the Foreign law, the *lex loci delicto commissi* to govern the case is not to be prevented by reason of its repugnance to justice or public policy. *The Amalia* (1), relied on by the other side, was a decision on the effect of the 54th section of the *Merchant Shipping Act* (25 & 26 Vict. c. 63), with respect to limited liability applying equally to British and Foreign vessels; it is not otherwise reconcilable with the previous decision in *The Bold Buccleugh* upon the doctrine of lien (2). The damage created a lien on the ship, to be given effect to by proceedings in the Court of Admiralty in this country. We contend, therefore, that we have a right to plead, as decided by the Court below, that the law of *Belgium*, within whose territorial waters the damage complained of took place from the Appellant's vessel, renders them, as owners, liable to make reparation for the wrong she has done. The Appellants knew when they took the Pilot on board they would be liable for his acts.

1868
July 2.

THE LORD JUSTICE SELWYN:—

This is an appeal from an Order by the Judge of the High Court of Admiralty, dated the 26th of November, 1867, and admitting the third article of the reply filed by the Plaintiffs in the Court below, who are the present Respondents.

The cause is a cause of damage promoted by the Respondents as owners of a Norwegian Barque called the *Napoleon*, against a British steam-ship called the *Halley*, and her owners, for the recovery of damages occasioned to the Respondents by reason of a collision which took place on the 8th of January, 1867, in *Flushing Roads*, between the *Napoleon* and the *Halley*.

In their petition the Respondents state that the collision was caused by the negligent and improper navigation of the *Halley*.

The Appellants, in their answer to that petition, state that the *Halley* is a Steamship belonging to the port of *Liverpool*, and that "by the Belgian or Dutch laws which prevail in and over the river *Scheldt*, and to which the said river is subject, from the place where the said river Pilot came on board the *Halley*, and thence up to and beyond the place of the aforesaid collision, it was compulsory on the said Steamer to take on board and be

(1) 1 Moore's P. C. Cases (N. S.) 471. (2) 7 Moore's P. C. Cases, 267.

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navigated under the direction and in charge of a Pilot duly appointed or licensed according to the said laws; and it was by virtue of such laws that the *Halley* was compelled to take on board and to be given in charge, and until the time of the said collision, as aforesaid, to remain in charge of, and did take on board, and was given in charge, and up to the time of the said collision remained in charge of the said river Pilot, who was duly appointed or licensed according to the said laws, and whom the Defendants or their Agents did not select and had no power of selecting;" and "that the collision was not caused by the negligence, default, want of skill, or improper conduct of any person on board the *Halley*, except the said river Pilot."

In reply to this answer, the Respondents pleaded the following, being the third article in their reply:—"By the Belgian or Dutch laws in force at the time and place of the said collision, the Owners of a Ship which has done damage to another Ship by collision, are liable to pay and make good to the Owners of such lastly-mentioned Ship all losses occasioned to them by reason of such collision, notwithstanding that the Ship which has done such damage was, at the time of the doing thereof, being navigated under the direction and in charge of a Pilot duly appointed or licensed according to the said laws, and notwithstanding that such damage was solely occasioned by the negligence, default, or want of skill of such Pilot, without any contributory negligence on the part of the Master or Crew of such lastly-mentioned Ship, and notwithstanding that it was at the time and place of the collision, by the said laws, compulsory on such lastly-mentioned Ship to be navigated under the direction and in charge of such Pilot; and the Defendants, the Owners of the *Halley*, are by virtue of the said laws, liable to pay and make good to the Plaintiffs all losses occasioned to them by the said collision, even if the statements contained in the eleventh article of the said answer be true."

The Appellants having moved the Court below to reject the third article of the reply, on the ground that, even if the third article were true, the Appellants would not be liable in the Court of Admiralty in *England*, the learned Judge of that Court has made the Order now under appeal, by which he has refused the motion of the Appellants, and has sustained the third article of the reply.

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The claim of the Respondents is stated by the learned Judge to be founded upon a tort committed by the Defendants in the territory of a Foreign State, and we are not called upon to pronounce any opinion as to the rights which the Respondents might have obtained, either against the Appellants as the owners of the *Halley*, or as against that Ship, if the Respondents had instituted proceedings and obtained a judgment in the Foreign Court. For this cause is a cause for damage instituted by petition in the High Court of Admiralty in *England;* and it is admitted by the Counsel for the Respondents that the question before us must be decided upon the same principles as would be applicable to an action for damages for the collision in question if commenced in the Court of Queen's Bench or Common Pleas. But it is contended on their part, and has been held by the learned Judge in the Court below, that the Respondents are entitled to plead that the law of *Belgium*, within whose territorial jurisdiction the collision took place, renders the owners of the *Halley*, although compelled to take a Pilot on board, liable to make reparation for the injury which she has done.

Their Lordships agree with the learned Judge in his statement of the Common law of *England*, with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel, while under the control of a Pilot, whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the Owner for the acts of his servant is founded upon the presumption that the Owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the Owner.

This exemption of the Owner from liability when the Ship is under the control of what has been termed a "compulsory Pilot" has also been declared by express Statutory enactments (1).

In cases like the present, when damages are claimed for tortious collisions, a chattel, such as a ship or carriage, may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious, that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel

(1) *Vide Merchant Shipping Act*, 1854, 17 & 18 Vict. c. 104, s. 388.

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itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer.

Assuming, as, for the purposes of this appeal, their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the Common law and Statute law of *England* to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the Appellants, a person whom they were compelled to receive on board their Ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded, the authority of the Master appointed by them; and their Lordships think that the maxim, "*qui facit per alium, facit per se*," cannot by the law of *England* be applied, as against the Appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognised by the law of *England* as creating any liability in, or cause of action against, the Appellants.

It follows, therefore, that the liability of the Appellants, and the right of the Respondents to recover damages from them, as the owners of the *Halley*, if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is, whether an English Court of Justice is bound to apply and enforce that law in a case, when, according to its own principles, no wrong has been committed by the Defendants, and no right of action against them exists.

The Counsel for the Respondents, when challenged to produce any instance in which such a course had been taken by any English Court of Justice, admitted his inability to do so, and the absence of any such precedent is the more important, since the right of all persons, whether British subjects or aliens, to sue in the English Courts for damages in respect of torts committed in Foreign countries has long since been established; and, as is observed in the note to *Mostyn* v. *Fabrigas*, in *Smith's* Leading Cases, vol. i. p. 656, there seems to be no reason why aliens should not sue in *England* for personal injuries done to them by

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other aliens abroad, when such injuries are actionable both by the law of *England* and also by that of the country where they are committed, and the impression which had prevailed to the contrary seems to be erroneous.

In the case of *The Amalia* (1), Lord *Chelmsford*, in delivering the opinion of the Judicial Committee, said: "Suppose the Foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a Court of Law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law which the Court would be bound to administer."

As Mr. Justice *Story* has observed in his Conflict of Laws, p. 32, "it is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other Nations or to those of their subjects." And even in the case of a Foreign judgment, which is usually conclusive *inter partes*, it is observed in the same work, at § 618A, that the Courts of *England* may disregard such judgment *inter partes* if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognised in *England* or other Foreign countries, or is founded upon a misapprehension of what is the law of *England*: *Simpson* v. *Fogo* (2).

It is true that in many cases the Courts of *England* inquire into and act upon the law of Foreign countries, as in the case of a contract entered into in a Foreign country, where, by express reference, or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts,

(1) 1 Moore's P. C. Cases (N. S.) 484. (2) 1 H. & M. 195.

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upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

The case of *Smith* v. *Condry* (1), in the Supreme Court of the *United States*, appears at first sight to have an important bearing upon this case; but, upon an investigation of the report, it does not appear that any question as to a conflict between the English law and the American law was discussed in that case, or that the precise point now under consideration was noticed in the judgment, nor is it specifically mentioned in any of the three exceptions which were taken to the decision of the inferior Court, and there is no report of the arguments.

Their Lordships think, therefore, that that case cannot be treated as an authority sufficient to support the contention of the Respondents; and, on the whole, they think it their duty humbly to advise Her Majesty to allow this appeal, and to order that the third article of the Plaintiff's reply be rejected, and that there should be no costs of this appeal.

Solicitors for the Appellants.: *Field, Roscoe, Field, & Francis.*
Proctors for the Respondents: *Clarkson, Son, & Cooper.*

(1) 1 Howard's Rep. (U.S.) 28.

THE OWNERS, MASTERS, AND CREWS OF THE STEAM VESSELS "DUBLIN," "TINTERNE," "WILLIAM WALLACE," "GIPSY," AND "CAMILLA" . . . . . } APPELLANTS;

AND

THE OWNERS OF THE VESSEL "CHETAH" RESPONDENTS.

AND

THE OWNERS OF THE VESSEL "CHETAH" APPELLANTS;

AND

THE OWNERS, MASTER, AND CREW OF THE VESSEL "ANNIE GRANT" . . . } RESPONDENTS.

J. C.*
1868
Nov. 26.

THE "CHETAH."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Salvage services—Reduction by appellate Court of amount awarded by High Court of Admiralty.

Port 240 — 255
3 P C 591, — 592
2 P D 188
8 Jur (N S) 561.

The Judicial Committee, though unwilling to interfere with the discretion exercised by the Judge of the Court below in questions of salvage, either by increasing or diminishing the sum awarded, will nevertheless, where, in their judgment, there has been excess in the amount, or the sum awarded is manifestly insufficient, exercise their own judgment as to the proper remuneration to be awarded and apportioned among the Salvors.

Where, therefore, upon a review of the evidence of the services rendered, they were of opinion (being assisted by the Nautical Assessors of the Court), that the services performed, though highly meritorious, were greatly overrated by the Judge of the Court below, the Judicial Committee reduced the sum awarded and apportioned for salvage services, by more than one-half.

Semble:—Salvage is a reward for services actually conferred, and not for services attempted to be rendered.

THESE were appeals from an interlocutory sentence of the High Court of Admiralty pronounced in two causes of salvage, the one promoted by the Appellants, the Owners of the Steam-vessels, *Dublin*, *Tinterne*, *William Wallace*, *Gipsy*, and *Camilla*, against the Owners of the *Chetah*, and the other by the Respondents, the Owners

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, THE LORD JUSTICE WOOD, and THE LORD JUSTICE SELWYN.

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of the *Annie Grant*, against the Owners of the *Chetah*, for salvage services rendered by them respectively to the Ship *Chetah* and her cargo. All parties being dissatisfied with the amounts awarded, the Appellants in the first appeal deeming the sum awarded and apportioned to them too small, and the Appellants in the second appeal, the Owners of the Vessel salved, considering the amount decreed to the Owners of the *Annie Grant* too large; appealed from the decree of the High Court of Admiralty. The two appeals, arising from the same cause of action and depending on the same evidence, were heard (as in the Court below) together.

The circumstances of the case were as follows:—

On the 17th of March, 1867, the *Chetah*, a Ship of 759 tons register, and manned by a crew of twenty-two hands, whilst on a voyage from *Macao* to *London*, with a general cargo, met with an accident to her rudder whereby she was disabled. She was then in latitude 48·46 N., and longitude 9·39 W. Her Master and crew constructed a jury rudder, but before they had fixed it she was fallen in with by the Schooner, *Annie Grant*, and with her assistance the *Chetah* arrived off *Waterford* on the evening of the 27th of the same month. The *Chetah*, which was then sailing with the *Annie Grant* astern of and steering her, stood on and off the land during the night, and at about 9 A.M. of the following day the steamship *Dublin* was seen coming out from *Waterford*, and was signalled to come to the *Chetah*. The *Dublin* came up, and at about 10 A.M. got a rope to the *Chetah* and attempted to tow her, but it was soon found that the *Dublin* was not of sufficient power to tow the *Chetah*, and it was arranged that the *Chetah* should come to anchor, and that the *Dublin* should proceed to the shore for further assistance; the *Dublin* accordingly, between 10 and 11 A.M., cast off and made for the shore, and the *Chetah* let go her anchor and brought up in about twenty-five fathoms of water, with the *Annie Grant* hanging astern of her. The *Chetah* so remained brought up until about 5.40 P.M., when the steamship *Gipsy* came to her and made fast, and the *Chetah* then slipped her anchor and chain, and the *Gipsy* proceeded to tow the *Chetah*, with the *Annie Grant* astern of and steering her. The chief Officer of the *Gipsy* boarded the *Chetah* and acted as Pilot. At about 9 P.M., whilst the *Gipsy* was still towing the *Chetah*, the *Dublin*

again came up, but finding the *Chetah* in tow of the *Gipsy*, she kept off at a distance from her. At 10 P.M the *Camilla* came up and attempted to get fast to the *Chetah*, but not succeeding in doing so, she went away and returned to *Waterford*. At about 10.30 P.M. the Steam-tugs *Tinterne* and *William Wallace* came up and were made fast, one on each side of the *Chetah*, in order to assist in steering her. The *Chetah* at this time had passed inside the *Hook Light* at *Waterford*. The *Gipsy* continued to tow the *Chetah*, with the *Annie Grant* astern, and with the two Steam-tugs fast to her, and at about 11.30 P.M. passed *Duncannon Fort*, and shortly before midnight let go her anchor above the *Spit off Passage*, and brought up in seven fathoms of water, when the *Gipsy* and *Tinterne* left her. The *William Wallace* and a Pilot remained by the *Chetah* till the following day. Whilst the Steamers were rendering their services to the *Chetah*, the weather was fine and the sea smooth, and no difficulty or danger was encountered by them, or those on board them. The *Chetah*, her cargo and freight, were together of the value of about £50,000.

Two causes of salvage were instituted in the High Court of Admiralty, by the Owners and Master of the vessels *Dublin*, *Tinterne*, *William Wallace*, *Gipsy*, and *Camilla*, and by the Owners, Master, and crew of the *Annie Grant* respectively, against the *Chetah* her cargo and freight, for their respective services, and both causes came on for hearing together.

The Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) awarded to the Plaintiffs in the first cause for their services, the sum of £355, and he apportioned that amount as follows, the sum of £150 to the Owners, Master, and crew of the Steam-vessel *Gipsy;* £70 to the Owners, Master, and crew of the Steam-vessel *William Wallace;* £50 to the Owners, Master, and crew of the Steam-vessel *Dublin*; £50 to the Owners, Master, and crew of the Steam-vessel *Tinterne;* and £35 to the Owners, Master, and crew of the Steam-vessel *Camilla*. He also awarded to the Plaintiffs in the second cause, the Owners, Master, and crew of the *Annie Grant*, the sum of £3,150, together with the sum of £535 in respect of damage incurred and loss by detention, sustained by the Owners of the *Annie Grant* in rendering their services.

The Plaintiffs in the first cause being dissatisfied with the sum of

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£355 so awarded to them, considering such as an wholly inadequate reward for their services, and that each of the sums allotted was severally insufficient, appealed, while the Owners of the *Chetah* being of opinion, that the sum awarded to the *Annie Grant* was excessive and ought to be reduced, also appealed against the above sentence.

The appeals were heard together.

Mr. *Milward*, Q.C., and Mr. *V. Lushington*, for the Appellants, the Owners, Masters, and crews of the Steamships, *Dublin*, *Tinterne*, *William Wallace*, *Gipsy*, and *Camilla*, in the first appeal:—

Submitted upon the evidence, that the sum of £355, awarded and apportioned to the several Steamships for their salvage services, was wholly inadequate as a reward for their respective services, and that each of the sums so allotted was severally insufficient.

Dr. *Deane*, Q.C., and Mr. *E. C. Clarkson*, for the Respondents, the Owners of the *Chetah*:—

Insisted, that the amount awarded and apportioned was ample and sufficient for the services afforded, and was justly apportioned.

Dr. *Deane*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants, the Owners of the *Chetah*, in the second appeal:—

Contended, that the sum of £3,150, awarded by the Court below to the Owners of the *Annie Grant* was excessive and ought to be reduced, and the decree appealed from reversed or varied. They referred to the cases of *The Raikes* (1), and *The Henry of Philadelphia* (2), and submitted, that the *Annie Grant*, being a small Schooner of 148 tons register only, was quite unable, as was proved by the evidence, to render any such sufficient towage service to the *Chetah* as was insisted on, and though her endeavours were admitted to have been meritorious, the sum awarded to the Owners of the *Annie Grant* was out of all proportion, excessive, and ought to be reduced.

Dr. *Spinks*, Q.C., and Mr. *R. A. Pritchard*, for the Respondents, the Owners of the *Annie Grant*:—

Argued, that as no question of law arose upon the judgment of the Court below, the amount awarded being one entirely of dis-

(1) 1 Hagg. Ad. Rep. 246. (2) Ibid. 264.

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THE "CHETAH."

cretion, which they contended was not improperly exercised, and ought not to be interfered with; that the circumstance of there being no case to be found where a Court of appeal had reduced the amount of salvage awarded by the Court below was a conclusive reason against the exercise of such a power; and they insisted that the appeal ought to be dismissed, and the judgment of the Court below affirmed with costs. They cited *The Messenger* (1); *The Andrew Wilson* (2); *The Vesta* (3); and *The Harriett* (4); *The Alfen* (5).

1868
Nov. 30.

Judgment was reserved, and now delivered by

LORD CHELMSFORD:—

These appeals are from the sentence or decree of the High Court of Admiralty in causes of salvage for services rendered by a schooner called the *Annie Grant*, and by five steam-vessels, called respectively the *Dublin*, the *Camilla*, the *Gipsy*, the *Tinterne*, and the *William Wallace*, to a Vessel called the *Chetah*, of the value, with her cargo and freight, of £50,000.

The learned Judge of the Court of Admiralty awarded to the *Annie Grant* a sum of £3,150 for her services, and, in addition, a sum of £200 for damages sustained, and £335 for detention of the vessel while rendering the services, making in the whole the sum of £3,685; and for the services of the five Steam-vessels he awarded a sum of £355, which he distributed amongst them in certain proportions.

The Owners of the *Chetah* have appealed from the decree in favour of the *Annie Grant*, on the ground of the amount awarded being excessive. And the Owners, Masters, and crews of the five Steam-vessels have also appealed on the ground that the sum of £355 is wholly an inadequate reward for their services.

In dealing with these cases their Lordships have felt some degree of embarrassment, in consequence of the unwillingness which has been invariably shewn by this Committee to interfere with the judicial discretion which has been exercised in questions of salvage where the *quantum* awarded was alone the subject of appeal.

(1) Swab. 191.
(2) Br. & Lush. 56.
(3) 2 Hagg. Ad. Rep. 189, 192.
(4) Swab. 218.
(5) Swab. 189.

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Thus, in the case of *The Carrier Dove* (1), the Lord Justice *Knight Bruce*, in delivering the opinion of their Lordships, said: "It has never been the rule or practice of this Committee to enter into the question of *quantum*, where there has been nothing (to use a familiar expression) to shock the conscience—nothing gross, nothing extravagant." In the case of *The Clarisse* (2) the same learned Judge, expressing the opinion of the Judicial Committee in less forcible terms, said:—"It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion."

In the case of *The Cuba* (3), which was an appeal from an award of salvage by Justices of the Peace, Dr. *Lushington* said:—"The question, therefore, for me to decide is, whether the sum awarded by the Justices is so exorbitant, so manifestly excessive, that it would not be just in me to confirm it."

And, lastly, in the case of *The Fusileer* (4) it was said, that "Their Lordships would always be slow to disturb an award of salvage by the learned Judge of the Court of Admiralty, on the ground of his having given too large a sum to the Salvors, unless they were satisfied, beyond all doubt, that he had made an exorbitant estimate of their services."

These cases shew that a party who seeks by appeal to increase or to diminish the remuneration which, in the discretion of a Judge before whom a cause of salvage is brought, is a proper estimate of the value of the services rendered, undertakes a very difficult task.

It was agreed by the Counsel on both sides that no case was to be found where, upon an appeal from a decree for salvage services, the amount awarded had ever been reduced. The deduction which the Counsel for the *Annie Grant* rather left to be drawn than drew himself, from the absence of such precedents, seems to have been that this Committee would never disturb the award of the Judge in this direction. But there are cases (5) in which their Lordships have increased the amount awarded for salvage services, on the ground that the Judge had formed too low an estimate of the

(1) 2 Moore's P. C. Cases (N.S.) 254.
(2) 12 Moore's P. C. Cases 344.
(3) Lush. 15.
(4) 3 Moore's P. C. Cases (N.S.) 69.
(5) See *The Scindia*, 4 Moore's P. C. Cases (N.S.) 84; *The True Blue*, Ibid. 96.

value of such services; and, in principle, there can be no difference between increasing and diminishing an amount awarded in these cases, both being equally an interference with judicial discretion. The fact of no instance being found of the reduction of the amount awarded by a decree for salvage upon appeal may possibly be accounted for, by the very natural desire which must always be felt to accept the most liberal estimate of services, which are usually of a highly meritorious character, and generally attended with peril of life and property. But however this may be, to assume from there being no case in which a decree for salvage services has been reduced in amount upon appeal that it ought never to be done, would be to draw an inference in opposition to the authorities previously mentioned; which, stating negatively that the Committee will not interfere with the discretion of a Judge as to the *quantum* of salvage where there has been nothing exorbitant, or manifestly excessive, in his estimate of the value of the services rendered, necessarily imply that where such excess or exorbitance exists they will exercise their own judgment as to the proper remuneration to the Salvors, and reduce it to a just and reasonable amount.

After the most careful consideration of the circumstances upon which the claim of the *Annie Grant* is founded, and with an anxious desire that the Salvors should receive not merely a fair, but a liberal remuneration for their services, their Lordships have come to a conclusion as to the value of the services rendered, widely differing from that of the learned Judge of the Court of Admiralty. The first and most important question in cases of this description, is the degree of danger to which the Vessel was exposed, and from which she was rescued by the Salvors. The learned Judge formed his opinion of the peril in which the *Chetah* was originally placed upon evidence to which the Appellants could have no possible objection, viz. the protest of her Master. But not being assisted with the advice of Nautical Assessors, he seems to have considered that that document described a state of things in which the *Chetah* was in imminent danger of being lost, unless prompt assistance had been afforded. Possibly their Lordships, reading the protest by the light of their own understandings, might have arrived at the same conclusion with the learned Judge. But they are advised by the Nautical Assessors, to whose knowledge and experience they

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have referred, that the description of the condition of the *Chetah* at the time when the *Annie Grant* tendered her services by no means indicates that degree of peril which the learned Judge seems to have supposed. She had, indeed, lost her rudder; but this loss might have been supplied by some temporary expedient, for which there were materials on board.

The most important element in a claim for high salvage reward, viz. the imminent peril of destruction of the Vessel to which assistance is rendered, is, therefore, wanting in this case.

Again, the mode in which the services of the *Annie Grant* were first applied appears to their Lordships to detract considerably from their merit. They are advised, that it was a very injudicious course to attempt to tow the *Chetah*, being without a rudder, with a small Schooner like the *Annie Grant*. That this opinion is well founded is proved by the fact, that in the course of the towing the *Chetah* overreached the *Annie Grant*, and occasioned part of the damage which she sustained, and for which a compensation has been awarded. The learned Judge of the Admiralty Court, adverting to this attempt at first to tow the *Chetah*, says, "It may be, for all I know, that this was an imprudent attempt, and that greater nautical skill and knowledge would have told the *Annie Grant* that it would turn out, as it did, a failure." He adds, indeed, that "no remonstrance was made on behalf of the *Chetah*, but, on the contrary, the *Annie Grant* seems to have acted under the direction of the *Chetah*." Whether this was so or not, it is clear, that as salvage is a reward for benefits actually conferred, not for a service attempted to be rendered, all the period during which the *Annie Grant* was unsuccessfully endeavouring to tow the *Chetah* should have been left out of the account in estimating her merit and the value of her services.

With respect to the risk incurred by the *Annie Grant* (which is always a circumstance to be considered in determining the amount of a salvage reward), it is observable that the greatest peril to which she was exposed was the consequence of her own injudicious and imprudent act of taking the *Chetah* in tow.

The really meritorious services of the *Annie Grant* commenced when, abandoning the repeated unsuccessful attempts to tow the *Chetah*, she was made fast to the *Chetah's* stern, in order that she

might act as a steerage-power upon her. Unless this course had been adopted, the *Chetah* would have been unmanageable at a time when, being near the Irish coast, she would have been exposed to the greatest danger. But with the assistance thus afforded by the *Annie Grant*, the *Chetah* was enabled to wear and stand off shore, and afterwards, on the following day, to run in towards the land so as to be able to avail herself of the services of the steam-vessels whose claim is the subject of the other appeal.

That the *Chetah* was rescued from a situation of considerable peril by the exertions of the Master and crew of the *Annie Grant*, and by the application of proper means for securing her safety at a time when, being crippled by the loss of her rudder, she would most probably, if not inevitably, have been driven on shore, there can be little (if any) doubt, and the services of the *Annie Grant* have, therefore, been the means of saving very valuable property from impending destruction. That they are entitled to a high salvage reward it is impossible to deny. But, their Lordships are of opinion, that the learned Judge of the Court of Admiralty, acting upon his own unassisted judgment, has greatly overrated the value of the services rendered by the *Annie Grant*, and that it is a case in which they are bound to reduce the amount awarded.

They think that, if the Owners, Master, and crew of the *Annie Grant* receive a sum of £1,500, for the salvage services of the Vessel, they will be most liberally and abundantly rewarded.

They will, therefore, recommend to Her Majesty to alter the decree of the Court of Admiralty, in the case of the *Annie Grant*, by reducing the sum of £3,150, for salvage to the sum of £1,500, and to affirm the decree as to the sum of £535, for the damage and detention of the Vessel, and that there should be no costs of the appeal on either side.

As to the case of the Steam-vessels, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Admiralty, and to dismiss their appeal, with costs (1).

Solicitors for the Owners of the *Dublin* and other Steamships: *Cattarns & Jehu.*

Proctors for the Owners of the *Annie Grant: Pritchard & Sons.*

Proctors for the Owners of the *Chetah: Clarkson, Son, & Cooper.*

(1) See *The England*, *post*, p. 253.

J. C.* THE OWNERS OF THE BRIG "ALICE". . APPELLANTS;
1868,
Nov. 26, 28. AND
THE OWNERS OF THE BRIG "ROSITA" . RESPONDENTS.

THE "ALICE" AND THE "ROSITA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Rule of pleading "secundum allegata et probata," when not binding.

The rule, that a party seeking redress for an injury can only recover "*secundum allegata et probata*," applies only to cases where the averments alleged in the pleadings are material to the issue raised.

Where, therefore, in a case of collision caused by a Vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two Vessels previous to the collision was incorrectly pleaded and alleged by the Vessel proved to be entitled to redress, it was *held* by the Judicial Committee, that the Vessels not being in motion, their previous relative bearing when at anchor was not such a material fact to the issue, namely, which Vessel caused the collision, as to render the actual proof of the damage of no avail, and so entitle the offending party to the benefit of the rule.

Semble: In the case of a collision between two Vessels originally at anchor, the bearing of one Vessel with respect to the other is not such a material fact as necessary to be stated upon the issue raised between the parties.

THESE were appeals from a decree of the High Court of Admiralty in a cause of damage.

In the Court below they were cross suits promoted by the owners of the *Rosita* against the *Alice* to recover damages for a collision which occurred between the Vessels in the *Margate Roads* on the 6th of February, 1867. The Owners of the *Alice* also sued the *Rosita* for damages in respect of the same collision. Both Vessels were riding at single anchor on the day in question, when a very great gale of wind sprang up, and under the influence of that gale both Vessels were driven before their second anchors were let down.

As is usual in cases of collision, where there are cross suits, each party charged the other with causing the collision, and as

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, THE LORD JUSTICE WOOD, and THE LORD JUSTICE SELWYN.

in this case the collision was occasioned by one of the Vessels drifting down on the other, the real question in the suits was, which of the two Vessels, the *Alice* or the *Rosita*, drifted on the other and so occasioned the accident. This of course depended on the relative position of the Vessels, the point of the wind, and state of the tide. The *Alice*, in her petition, alleged that the tide being flood and running to the north-eastward, the wind being W.N.W., she was lying with her head to the north-eastward, with the wind on her port quarter, and that at the same time the *Rosita*, with the wind on her starboard quarter, was lying distant about a cable's length to the north-westward of the *Alice*. Whereas the *Rosita*, both in her answer and in her petition in the cross suit, alleged that the *Alice* when at anchor had been riding south-west of the *Rosita*, and came driving down athwart the tide towards her, and so caused the collision.

The Court below in both suits found the *Alice* solely to blame for the collision. The owners of the *Alice* appealed in both suits.

In his judgment, the learned Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*), after stating the circumstances and position of the Vessels, observed: "The statement on the part of the *Alice* is, that she was lying with her head to the north-eastward, and that the *Rosita* was lying to the westward of her. The wind was admitted to have been W.N.W., and, in these circumstances, it is contended that the *Rosita* must have drifted, under the influence of the wind, upon the *Alice*. It is stated on the part of the *Alice*, both in the petition and in the evidence, that the collision took place by the *Rosita's* stern striking the port-quarter of the *Alice;* but the Trinity Masters (by whom the learned Judge was assisted) think it is impossible, upon the statement, that the collision could have taken place as described, and they are of opinion, that the *Alice* must have been to the south-eastward, and not to the north-westward of the *Rosita* on the morning of the collision. The *Rosita* says she was riding with sixty fathoms of chain on the port anchor, and twenty-five on the starboard, and another anchor attached to the *Shamrock*, and this weight of anchor renders it extremely improbable that the *Rosita* could have drifted down on the *Alice*."

The appeal in both suits was from this decree.

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Mr. *Milward*, Q.C., and Mr. *A. Pritchard*, for the *Alice*.

Dr. *Deane*, Q.C., and Mr. *V. Lushington*, for the *Rosita*.

The question, which was one entirely of evidence, and had been so argued and treated in the Court below, having been opened by Counsel on both sides, their Lordships took exception to the pleadings of the *Rosita*, on the ground that there was a material variance between the allegation and proof in her case respecting the relative position of the two Vessels previous to the collision.

LORD CHELMSFORD :—

Their Lordships have been placed in some little difficulty in this case, and they desire to hear one Counsel on each side in the *Rosita* suit, upon the ground, that the cause of injury is not properly alleged in the pleadings. There have been recent decisions in which their Lordships have held it necessary that a party seeking redress for an injury can only recover "*secundum allegata et probata.*" In a case in which the circumstances proved did not establish the allegations in the pleadings, although upon the true state of facts the Plaintiff would have been entitled to recover, the learned Judge of the Court of Admiralty having decided against the Plaintiff, upon what their Lordships considered to be an erroneous ground, yet they felt themselves bound to declare that the decree ought to be affirmed, not upon the ground on which it was pronounced, but because the case set up by the Appellants had not been proved by the evidence. Now, in the cases before us, in the petition of the *Rosita* in the cross suit, as well as in the third allegation in her answer to the petition of the *Alice* in the principal suit, it is alleged, that the Brig *Alice* had been riding about half a mile to the south-west of the *Rosita*, and that she came driving down athwart the tide towards the *Rosita* and so the injury happened. Now, their Lordships are clearly of opinion, that it is most distinctly proved that the *Alice* was to the south-east, and not to the south-west of the *Rosita*, and they think it has been shewn very clearly that, if the *Alice* had been to the south-west of the *Rosita* the collision never could have taken place in the way in which it actually occurred. Under these circumstances, the *Alice* comes here to meet a different case from that which is alleged in the

pleadings of the *Rosita*. Their Lordships are particularly anxious to hear one Counsel on each side upon the subject of the pleadings; and whether, supposing their Lordships should be of opinion, that the *Alice* was in fault, the *Rosita* would be entitled to their judgment, inasmuch as she has not stated her case correctly and properly?

Mr. *R. A. Pritchard*:—

In the circumstances now before the Court upon the pleadings, the Owners of the *Rosita* must be considered in every respect as Plaintiffs. Their allegation in the petition in the cross suit being similar to their defence in the suit promoted against them by the *Alice*. They allege, that the *Alice* was to the south-west of the *Rosita*, whereas it is proved, both in the cross suit by the *Rosita*, as well as in the principal suit, that the *Alice* was south-east of the *Rosita* at the time of the collision. Now, though in causes of damage the Defendants are not held strictly to their pleadings, and as such the Owners of the *Rosita* might not be within the rule, yet as Plaintiffs, which they are in the cross suit, they can only succeed "*secundum allegata et probata*": *The Ann* (1); *The North American* (2); *The Amalia* (3). They cannot have the benefit of facts not pleaded, if not proved, nor of facts proved, if not pleaded. The cases which may probably be relied upon on behalf of the Owners of the *Rosita*, namely, *The Moderation* (4), and *The Despatch* (5), shew that, under certain circumstances, the discrepancy between the pleadings and the proofs is not regarded when the facts, though incorrectly pleaded, are not material to the issue. But in this case, the Owners of the *Rosita* have not accurately pleaded a fact that is essential to the proof of their case. The distance and bearing of the Vessels when first seen must always be stated in the preliminary act, and the pleadings should not be less extensive. Though the new rules have modified the pleadings, the learned Judge of the Court below seems to be of opinion, that the general rule I contend for, as a requisite of pleading, remains the same: *The Claus Thornsen* (6). The mispleading, therefore, on the part of the *Rosita* is fatal, and the cross suit brought on her behalf ought to have been dismissed with costs.

(1) 13 Moore's P. C. Cases, 198; S. C. 1 Lush. 55.
(2) 12 Moore's P. C. Cases, 331; S. C. 1 Swab. 358.
(3) Br. & Lush. 311.
(4) 1 Moore's P. C. Cases (N.S.) 528.
(5) 14 Moore's P. C. Cases, 83.
(6) 32 L. J. (Adm.) 106.

J. C. Dr. *Deane*, Q.C.:—

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THE "ALICE" AND THE "ROSITA." No objection to the pleadings was taken in the Court below, and the point now suggested by your Lordships has not even been raised on the appeal. It is, no doubt, competent for the Court to take such objection; but if it had been raised or taken below, we might, if necessary, have amended our pleadings. We are, therefore, placed to great disadvantage by being called on to argue so important a point in the final Court of appeal. But the rule does not apply in our case. It is quite true, that the Plaintiff's proofs must correspond with the pleadings, so far as is material to the case laid by him; but if the Plaintiff proves all that is material, then the rule "*secundum allegata et probata*" does not apply. The principal question here is, not as to the relative position of the Vessels when they first anchored; but whether or no the *Alice* drove down upon the *Rosita*. That fact is alleged, and it is amply proved, and that proof entitles the owner of the *Rosita* to recover. The error, if it be one, in the pleadings, respecting the relative position of the Vessels when at anchor, is immaterial. The fact of the collision is established, and that is sufficient.

LORD CHELMSFORD:—

These cases have been argued before their Lordships upon somewhat different grounds from those upon which the argument, and apparently the judgment, proceeded in the Court below. We say apparently, because it appears that by the correction of an evident mistake in the printed judgment the foundation of the argument against it will be entirely removed. The mistake arises in the statement of the relative positions of the two Vessels just before the collision. There is no doubt that, according to the evidence on both sides, when the *Rosita* came to an anchor in the *Margate Roads* on the 4th of February, she was to the north-west of the *Alice*, and, consequently, the *Alice* was to the south-east of her. It does not appear, although the distance between the Vessels was probably lessened, that their relative position to each other was ever altered. In the answer on the part of the *Rosita*, and in her petition in the cross-suit, it is said, that the *Alice* had been riding about half a mile to the south-west of the *Rosita*, and that she came driving down athwart the tide towards the *Rosita*.

Their Lordships are satisfied that, under the alleged state of circumstances, the Vessels could not have come together as they did, viz., the port-quarter of the *Alice* in contact with the port-bow of the *Rosita*. It is evident when the learned Judge states, that the Trinity Masters think it impossible upon the statement that the collision could have taken place as described, and that they are of opinion, that the *Alice* must have been to the south-eastward and not to the north-westward of the *Rosita* on the morning of the collision,—that the words "north-westward" are a mistake, and that it must be read "to the south-westward," or, at all events, that the negative proposition may be rejected altogether, and the opinion of the Trinity Masters taken, that the *Alice* must have been to the south-eastward of the *Rosita*.

The great contest between the parties is which Vessel drifted. In the answer of the *Alice* to the petition it is said: "The *Rosita* was lying on the port-beam of the *Alice*, and the crew of the *Rosita* were heaving in her chains. Under the circumstances aforesaid, those on board the *Alice* observed the *Rosita* with her port-chain taut under her bow, and apparently dragging her anchor, coming down over the tide and before the wind with her yards square, and stem on towards the port-quarter of the *Alice*." On the other side, the *Rosita* says, that it was the *Alice* that drifted upon her.

Now, there is contradictory evidence upon this subject, each set of witnesses stating the case in favour of the Vessel to which they respectively belong. Upon these questions of fact the learned Judge of the Court of Admiralty states, in concurrence with the opinion of the Trinity Masters, that "the *Rosita* says she was riding with sixty fathoms of chain on the port-anchor and twenty-five on the starboard, and another anchor attached belonging to the *Shamrock*; and this weight of anchors renders it extremely improbable that the *Rosita* could have drifted down on the *Alice*." Now, the learned Judge having come to this conclusion upon a question of fact, even if their Lordships doubted whether that conclusion was correct, unless they were perfectly clear that it was wrong, they would be disposed to adopt his decision. But their Lordships are satisfied (and they have the assistance of the very able Nautical Assessors here who concur in that view) that the fact is as the learned Judge has decided it to be.

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That being the case, if the *Rosita* did not drift upon the *Alice* the case of the *Alice* fails altogether, because it is the very foundation of her case that the *Rosita* moved, that she drifted down upon her, and that the collision was occasioned in that way. Therefore, thus entirely failing in the proof of the averment in her petition, of course her case must altogether fail; and their Lordships, under the circumstances, will have no difficulty in recommending to Her Majesty that the decree of the Judge of the Court of Admiralty should be affirmed, and the appeal of the *Alice* dismissed with costs.

Turning to the case of the *Rosita*, and to the objection, which must be considered as a preliminary objection, which is made to the pleadings and to the proof in support of those pleadings, it is objected on the part of the *Alice* that the statement of the *Rosita* that the Brig *Alice* had been riding about half a mile to the south-west of the *Rosita* is a material allegation, and, being disproved by the evidence, the case of the *Rosita* must altogether fail. Now, their Lordships are extremely anxious to adhere with as much strictness as possible to the rule which has been laid down in the various cases which have been cited in the course of the argument—that a party can only recover *secundum allegata et probata*. But the question in this case is, whether the *Rosita* has not established every part of the allegation which was material to her cause, and whether the words which are referred to as not having been supported by the evidence were material and necessary to be proved as part of that allegation.

Before the introduction of the new rules, the pleadings in the Court of Admiralty were extremely diffuse, of which many of us have had experience, and in framing these rules it was considered important to reduce the length of pleadings, and to bring the parties to a short statement of the facts upon which they respectively founded their cases. Accordingly, the 67th of the Rules of 1859 says: "Every pleading shall be divided into short paragraphs, numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue." Now, the question upon the pleadings of the *Rosita* is, whether the statement that the *Alice* was riding to the south-west of her, is a fact material to the issue. There can be no

doubt whatever that if these Vessels had been both in motion, the bearings of the Vessels with regard to each other would have been a most material fact to be alleged and proved, because the course to be adopted by the one Vessel or the other would, of course, depend entirely upon their relative positions when they came in sight. But this is a case in which both the Vessels were at anchor, and the material question is—which of the Vessels drifted on the other. Now, the position of either Vessel, with regard to that material fact, does not appear to their Lordships to be an essential element in the statement of the cause of injury, and they have tried that question in various ways. The question was put to Mr. *Pritchard*, whether, if the statement that the *Alice* was to the south-west of the *Rosita* had been entirely omitted from the pleadings, the allegation would have been insufficient; and he answered, that in his view, it certainly would not. Then, again, supposing this statement had been omitted altogether, could the *Rosita* have gone to the Court of Admiralty to have the pleadings reformed on the ground of their omission of an essential circumstance in the allegation? There can be no doubt that that course could not have been successfully adopted. That being so, is it not evident that in the case of collision between two Vessels originally at anchor, the bearing of the one Vessel with respect to the other is not such a material fact as necessary to be stated upon the issue raised between the parties. Therefore, we are not infringing any rule of the Court of Admiralty, or going contrary to any of the decisions upon this subject, by holding that the direction in which the *Alice* was riding with reference to the *Rosita* is not a fact material to the issue, and that the objection to the pleadings on this ground fails. It may be said, as it has been said, that the *Alice* was likely to have been misled by this allegation, because she must have been aware that if the Vessels were in the position alleged by the *Rosita*, it was quite impossible that the accident could have occurred in the way alleged; that is, by the port-quarter of the *Alice* coming in contact with the port-bow of the *Rosita*. The parties might, therefore, have come to the Court prepared to meet a totally different case, and with a very different defence from that which it was necessary to oppose to the proof of a different relative position of the two Vessels. But with regard

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to the possibility of any misleading, there could have been none in this case, because it is quite clear that the *Alice* stated the circumstances according to her own view; and placed the Vessels in the exact position in which they were proved to be; therefore, even if the possibility of her being misled could have been an objection to these pleadings, the objection would have failed for want of a foundation. Under these circumstances, their Lordships are of opinion, that the claim of the *Rosita* is not prejudiced by the allegation that the *Alice* was lying to the south-west of her before the collision, and that her case is fully established.

Now, a very few words in regard to the mode in which the accident occurred. If the *Alice* had been to the south-west of the *Rosita*, it is quite clear that the accident could not have occurred in the way described. But it must be taken as proved that the *Alice* was to the south-east of the *Rosita*. Acting under the able assistance of our Nautical Assessors, their Lordships are of opinion that, taking the position of the Vessels to have been as described, the *Alice* lying to the south-east of the *Rosita*, the wind being to the northward of west, and the tide running in an opposite direction to the wind, the *Alice* having catted her port-anchor, and the other anchor being out the whole length of the cable, eighty fathoms, the combined action of the wind and the tide would carry the *Alice* down towards the *Rosita* with a slackened chain, and that having drifted a cable's length (the distance between the two Vessels), she would be checked, and then would drift down with the tide and come into collision with her port-quarter against the port-bow of the *Rosita*. Thus it is satisfactorily shewn that the damage was occasioned by the drifting of the *Alice*, and happened exactly in the way in which it has been proved to have occurred.

Under these circumstances, therefore, their Lordships will recommend Her Majesty to affirm the sentence of the Judge of the Court of Admiralty in favour of the *Rosita*, and to dismiss the appeal of the *Alice* with costs.

Proctors for the Appellants: *Pritchard & Sons.*
Solicitors for the Respondents: *Stocken & Juff.*

THE REV. LEWIS RUGG, CLERK . . . APPELLANT;

AND

THE RIGHT REV. THE LORD BISHOP OF WINCHESTER . . . . . } RESPONDENT.

J. C.*
1868
Nov. 16, 17.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical Law—Offence against—Church Discipline Act—Act of Uniformity—Construction of ss. 77 *and* 109 of 1 & 2 *Vict. c.* 106.

The shutting up and refusing to perform Divine Service in one of two Churches, forming together a distinct Parish and Benefice under an Order in Council, made pursuant to the 1 & 2 Vict. c. 106, and 2 & 3 Vict. c. 49, is an Ecclesiastical offence cognizable under the *Church Discipline Act*, 3 & 4 Vict. c. 86, and the Incumbent persisting in such a course, after notice from the Ordinary, may be proceeded against under that Act for having offended against the Ecclesiastical Law of the realm, by a contumacious refusal to obey the lawful order of his Bishop.

The 13 & 14 Car. 2. c. 4 (The *Act of Uniformity*), does not apply where there are two Churches in the same Parish, so as to require the Incumbent to perform morning and evening service in each of them every Lord's day, and the words of sect. 2 of that Statute "every Church, Chapel, or other place of public worship within this realm of *England*," must be read "in each Church" for which there is a Minister.

The jurisdiction given exclusively to the Bishop by the 109th section of the 1 & 2 Vict. c. 106, has reference only to proceedings taken under that Act, and does not oust the general jurisdiction of the Ecclesiastical Court for an offence committed against the Common Ecclesiastical Law.

Quære: Whether the refusal to perform service in one of two Churches in a Parish is an inadequate performance of Ecclesiastical duties within the meaning of the 77th section of the Statute, 1 & 2 Vict. c. 106.

THIS was an appeal from a decree of the Arches Court of *Canterbury*, in a cause of office promoted by the Respondent, the Bishop of *Winchester*, against the Appellant, the Rev. *Lewis Rugg*, Clerk, the perpetual Curate and Incumbent of the Curacy and Benefice of *Ecchinswell-with-Sydmonton*, in the County of *Southampton*, for having, within two years then last past, offended against the Laws Ecclesiastical:—"By having omitted to perform, or to provide

* *Present:*—THE LORD CHANCELLOR (LORD CAIRNS), THE ARCHBISHOP OF YORK, LORD CHELMSFORD, LORD WESTBURY, SIR WILLIAM ERLE, and SIR JAMES WILLIAM COLVILE.

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for the performance of, public Divine Service as prescribed in the Book of Common Prayer, and administration of the Sacraments, and other rites and ceremonies, according to the use of the Church of *England*, in the Church or Chapel of *St. Mary, Sydmonton*, on Sunday, the 12th day of May, on Sunday the 19th day of May, on Sunday, the 26th day of May, and on Sunday, the 2nd day of June, all in the year of our Lord, 1867."

The cause came before the Arches Court, by Letters of Request from the Bishop of *Winchester*, in accordance with the provisions of the *Church Discipline Act*, 3 & 4 Vict. c. 86, s. 13.

The Appellant appeared to the decree or citation under protest, and brought in his Act on petition, wherein he protested against the jurisdiction of the Court, on the grounds: First, that by reason of the provisions contained in the Act, 1 & 2 Vict. c. 106, ss. 77 and 109, proceedings could not be taken against him under the 3 & 4 Vict. c. 86, for the offence set forth in the decree; secondly, that the Church of *St. Mary, Sydmonton*, was an unconsecrated Building; and thirdly, that on the Sundays on which he was charged with having omitted to perform Divine Service in the Church of *St. Mary, Sydmonton*, he had performed two full Services in the Church of *St Lawrence, Ecchinswell.*

Affidavits in support of the Act on petition, answer and reply, were brought in, and on the 5th of February, 1868, The Right Hon. Sir *Robert Phillimore*, the Dean of the Arches Court, having heard the Appellant on his own behalf, overruled the protest and assigned him to appear absolutely.

On the 6th of February, 1868, Articles were brought in on behalf of the Bishop of *Winchester* and admitted. These Articles pleaded:— First, that by the Common Ecclesiastical Law of the realm, and by the Statute, 13 & 14 Car. 2, c. 4, s. 2, every Clerk in Holy Orders of the United Church of *England* and *Ireland* is bound on every Sunday to perform, or to provide for the performance of, public Divine Service in every consecrated Church or Chapel of the Ecclesiastical Parish or Benefice of which he is the Incumbent. Second, that the Appellant was a Clerk in Holy Orders of the United Church of *England* and *Ireland*, and the Perpetual Curate and Incumbent of the Perpetual Curacy and Benefice of *Ecchinswell-with-Sydmonton*. Third, that such perpetual

Curacy and Benefice consisted of two ancient Parochial Chapelries, then and for many years past known by the respective names of *Ecchinswell* and *Sydmonton*, in each of which there had been from time out of mind a consecrated Church or Chapel, to wit, the Church or Chapel of *St. Lawrence, Ecchinswell*, and the Church or Chapel of *St. Mary, Sydmonton;* that such ancient Parochial Chapelries, up to the 18th of August, 1852, belonged for all Ecclesiastical purposes to the Vicarage and Parish Church of *Kingsclere*, but were separated therefrom by an Order in Council, bearing date the 18th of August, 1852, and since that date had been and were a separate Parish for Ecclesiastical purposes, and a perpetual Curacy and Benefice by the name or style of the perpetual Curacy of *Ecchinswell-with-Sydmonton*. Fourth, a copy of the Order in Council, bearing date the 18th day of August, 1852. Fifth, the omission on the part of the Appellant to perform Divine Service in the Church of *St. Mary, Sydmonton*, on the days thereinbefore set forth. Sixth, certain correspondence between the Appellant and Messrs. *Burder* and *Dunning*, the Secretaries of the Bishop of *Winchester*, in reference to the omission on the part of the Appellant to perform Divine Service on the days mentioned. Seventh, the Letters of Request by the Bishop of *Winchester;* and the acceptance thereof by the Dean of the Arches, thereby founding the jurisdiction of the Court. The eighth was the usual concluding Article, praying the Court to pronounce that the Appellant had offended against the Law Ecclesiastical, and that he might be admonished to abstain from so offending in future, and might be condemned in the costs of the proceedings.

To these Articles a responsive plea was brought in on behalf of the Appellant. In this plea the fact of the omission on the part of the Defendant to perform, or to provide for the performance of, public Divine Service in the Church of *St. Mary, Sydmonton*, on the days specified, was, in effect admitted, but a justification of such omission alleged, and the commission of any offence against the Common, Ecclesiastical, or the Statute Law of the realm, was denied.

On the 16th of April, 1868, a Pamphlet, entitled "Correspondence with the Bishop of *Winchester*, and Protest of the Incumbent against the Consecration of a Church at *Sydmonton*, in *Hants*,"

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was brought in on behalf of the Respondent and admitted by the Appellant, and the pleadings concluded.

On the 2nd of May, 1868, the Judge of the Arches Court (The Right Hon. Sir *Robert Phillimore*), by an Interlocutory decree, declared that the Respondent had sufficiently proved the Articles given in and admitted in the cause, and held that the Appellant had offended against the Laws Ecclesiastical by not having regularly performed Divine Service in the Church or Chapel of *St. Mary, Sydmonton,* as required by the Lord Bishop of the Diocese; and admonished the Appellant to resume and continue to perform, or provide for the performance of, public Divine Service, as prescribed in the Book of Common Prayer, in the Church or Chapel of *St. Mary, Sydmonton;* and further condemned him in the costs.

This decree was the subject of the present appeal.

The Appellant, in person:—

Raised the following grounds and argued, that the decree of the Dean of Arches was wrong:—

First, that the alleged omission of duties did not constitute an offence against the Laws Ecclesiastical within the meaning of the Statutes, 3 & 4 Vict. c. 86, and 13 & 14 Car. 2, c. 4; and that having performed morning and evening Services, with Sermons, in the Parish Church of *St. Lawrence, Ecchinswell,* on each of the respective days specified in the Articles of complaint, he had fully complied with the requisitions of the 2nd section of the 13 & 14 Car. 2, c. 4, and was not chargeable with any dereliction of clerical duty whatsoever, and he insisted that the 109th Canon applied, and that this was not an Ecclesiastical offence defined or provided against by that Canon.

Secondly, he maintained, that the non-performance on the Lord's day of Divine Service in one of two Churches and Chapels, both being locally situate within one separate Parish and Benefice for Ecclesiastical purposes, two full Services having in fact been performed for the whole Benefice in the other of the two Churches on the days specified in the Articles of complaint, would subject him, if he were in any wise amenable, to be proceeded against under the 77th section of 1 & 2 Vict. c. 106; and he con-

tended, that the Ordinary was precluded by the provisions of that section and the 109th section of that Statute from taking proceedings under any other Statute.

Thirdly, that the recitals in the Order in Council of the 18th of August, 1852, importing that at *Sydmonton*, within the separate Parish and Benefice, a Chapel and Chapel-yard existed at that date, were erroneous; that a Building which had formerly existed, and had been so designated, had been demolished for the space of three years and upwards, and that the Order, so far as it related to such Building and Chapel-yard, had, therefore, no operation, and cited the case of *Rex* v. *Greene* (1).

Fourthly, that, under the circumstances above stated, it was not competent to the Ordinary to consecrate the Building erected in 1853, as or for a Parish Church (a Parish Church already existing in the Benefice), alleging that neither the Patron nor the Minister consented, and that no endowment had been granted.

Fifthly, that assuming the Ordinary to have had jurisdiction over the ancient Building, and not to have lost such jurisdiction by its demolition without a Faculty, under such circumstances, the Ecclesiastical Court having jurisdiction over the ancient footway leading into the Building, and that footway having been, as he alleged, closed up, it became, as he maintained, the duty of the Court below to order the footway to be re-opened, before admonishing the Appellant to obey the direction of his Ordinary to perform Divine Service in such building.

Dr. *Swabey* (with whom was Dr. *Deane*, Q.C.) for the Respondent, argued that the decree appealed from ought to be affirmed, and the cause remitted to the Court below, for the following reasons:—

First, because the Appellant was the Incumbent of a Benefice consisting of two distinct districts or Chapelries, in each of which there was a consecrated Building, Church, or Chapel; secondly, that the Appellant was bound by law to perform or provide for the performance of Divine Service in each of such Buildings, Churches, or Chapels; thirdly, that the Appellant had no right to choose in which of the Churches or Chapels he would perform

(1) 6 Ad. & E. 548.

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Divine Service, and entirely neglect to perform or provide for the performance of any Divine Service in the other of such Buildings, Churches, or Chapels; and lastly, that the reasons alleged by the Appellant for not performing, or providing for the performance of Divine Service, in both of the Churches, or Chapels, were wholly insufficient, irrelevant, and unfounded in law.

1868 *Dec.* 23.

Their Lordships having reserved judgment, it was now delivered by

LORD CHELMSFORD:—

The Appellant in this case is the Incumbent of the Benefice of *Ecchinswell-with-Sydmonton*, in the County of *Southampton*, and he appeals from a sentence of the Arches Court, pronounced in a cause instituted under the *Church Discipline Act*, by which sentence the Judge declared that the Appellant had offended against the Laws Ecclesiastical by not having regularly performed Divine Service in the Church or Chapel of *St. Mary, Sydmonton*, as required by the Lord Bishop of the Diocese, and monished him to resume and continue to perform, or to provide for the performance of, public Divine Service, as prescribed in the Book of Common Prayer, in the Church or Chapel of *St. Mary, Sydmonton*, and further condemned him in costs.

It appears that *Ecchinswell* and *Sydmonton* were two ancient Chapelries belonging to the Vicarage of *Kingsclere*, with a Church or Chapel in each of the Chapelries, each Chapelry being also a separate Parish for all civil purposes; and in the year 1852, a proposal or scheme for the union of the two Chapelries into a separate Parish and Benefice, and for their separation from the Vicarage of *Kingsclere*, was set on foot by the Bishop of *Winchester*, under the provisions of the 1 & 2 Vict. c. 106, and the 2 & 3 Vict. c. 49.

This scheme was certified by the Archbishop of *Canterbury* to the Queen in Council, and all necessary consents having been given, it was ultimately approved of by Her Majesty in Council, and became binding under the Acts referred to.

By this scheme it was provided, that the two Chapelries of *Ecchinswell* and *Sydmonton* should be separated from the Vicarage of *Kingsclere*, and be united so as to form together a separate

Parish for Ecclesiastical purposes, and a Perpetual Curacy and Benefice, by the name or style of the Perpetual Curacy of *Ecchinswell-with-Sydmonton*. That the proposed separate Parish and Benefice should be subject to the same Ecclesiastical jurisdiction as the said Vicarage of *Kingsclere*, and the Incumbent of such separate Parish and Benefice should have exclusive cure of souls within the limits of the same. That two Churchwardens should be annually chosen in the customary manner, and at the time when Churchwardens are usually appointed, in and for each of the said Chapelries; and every person so chosen should be duly admitted, and should do all things pertaining to the office of Churchwarden as to Ecclesiastical matters within the said Chapelries. That the freehold of the Churches and Churchyards of *Ecchinswell* and *Sydmonton*, so far as the same might be vested in or belong to the Incumbent for the time being of the said Vicarage, and also all the glebe lands of and belonging to the said Vicarage situate in the said Chapelries of *Ecchinswell* and *Sydmonton*, with the appurtenances; and also (except as thereinafter mentioned) all so much and such part of the tithe rent-charges or other payments or compositions for or in lieu of tithes belonging to the said Vicarage as arose and accrued, or were payable within or in respect of the said Chapelries of *Ecchinswell* and *Sydmonton*, should belong and be attached to the said proposed separate Benefice of *Ecchinswell-with-Sydmonton* for ever, and be held, received, and enjoyed by the Incumbent thereof for the time being, accordingly. That the Parishioners of *Ecchinswell* and *Sydmonton* should be liable as theretofore to the expenses of repairing and maintaining their respective Churches, and the other expenses incidental to the due performance of Divine Service therein respectively, and should be exempt from all rates, charges, and assessments to be made for or in respect of the Parish Church of *Kingsclere* aforesaid, or for or in respect of any other Church or Chapel situate elsewhere than within the limits of the said proposed separate Parish. That the patronage or right of nomination of or to the said proposed separate Benefice of *Ecchinswell-with-Sydmonton* should be and remain in the Vicar of the said Vicarage and Parish Church of *Kingsclere* for the time being and his successors for ever. That the Parishioners of *Ecchinswell* and *Sydmonton* should be entitled, as theretofore, to

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accommodation in their said respective Churches, but should not henceforth be entitled to any accommodation in the Parish Church of *Kingsclere*.

It is enacted by the Statutes already mentioned, that a scheme thus approved of, and made an Order in Council, shall come into operation forthwith, and be binding on all persons whatsoever, whether the Benefice or Benefices thereby affected be or be not vacant (1).

Shortly after the date of the Order in Council, the Appellant became the Incumbent of the Parish or Benefice thus created. The Church at *Sydmonton* was at this time pulled down for the purpose of being rebuilt, and it was rebuilt on the lines of the ancient structure in 1853.

It appears that from the year in which the new Church at *Sydmonton* was opened for Divine Worship, until 1863, service was performed in the Church by the Appellant. Some doubt then arose whether the new Building required reconsecration; and the Appellant taking advantage of this doubt, closed the Church, and refused his consent to its being reconsecrated. To such an extent was his perverse conduct carried, that on the day appointed for the consecration, the 17th of August, 1865, he caused the door of the Church to be locked, carried away the key, and refused to be present at the ceremony. There can be no justification or excuse for such conduct. If the new Church required reconsecration (which, as it was built on the site of the old Church, may well be doubted), it was the duty of the Appellant to have promoted and assisted such reconsecration. The Appellant has since contended that the consecration is invalid, as it took place without his consent, and even against his protest. But their Lordships entertain no doubt that, even assuming reconsecration to have been necessary, the Appellant, having regard to the site of the Building, the purpose for which it was erected, and the provisions of the Order in Council, was not in a position to have refused his assent to the consecration. In the consideration of this case, therefore, the Church at *Sydmonton* must be taken to be a lawfully consecrated Church.

On the 5th of May, 1867, the Appellant gave public notice in the Church at *Sydmonton* that there would be no more service in that

(1) See 1 & 2 Vict. c. 106, s. 26, and 2 & 3 Vict. c. 49, s. 6.

Church; and for the two following Sundays Divine Service was not performed in it. Complaint having been made to the Bishop of *Winchester*, he, on the 23rd of May, 1867, by a Letter from his Secretary to the Appellant, desired to know whether the information he had received was correct, and if so, on what ground he had suspended the service. To this Letter the Appellant on the 27th May, 1867, replied in these terms:—"In answer to your Letter addressed to me at the request of the Bishop of *Winchester*, I have to inform you, that I have discontinued the service at *Sydmonton*, and have returned to the two full services in the Church at *Ecchinswell* as performed by me during the first four years of my charge of this Parish. I think I shall best discharge my duty to my Parishioners generally by the return to the two full services (morning and evening) here, and that this will be more strictly in accordance with the requirements of both the Common and Ecclesiastical Law, than having only one service here in order that there may be one in a Building which I cannot recognise as even having been lawfully consecrated, and for the sake merely of one family (not much resident) and their immediate dependents, when the great bulk (more than nine-tenths) of my Parishioners live nearer to *Ecchinswell* Church, where they can better and more conveniently attend, than by having to go out of their way a mile or two more distant to *Sydmonton* House."

The following Letter, dated the 30th May, 1867, was then written by the Bishop's Secretaries to the Appellant:—"We have laid your letter of the 27th before the Bishop of *Winchester*. We are desired to state that the Bishop requires you to resume the service at *Sydmonton* Church on Sunday next, and to continue the performance of such service in future; and we beg to add that we have forwarded a copy of this Letter to the Churchwarden, and requested him to inform the Bishop whether his order is complied with."

The following was the reply of the Appellant to the order of the Bishop:—"*Ecchinswell*, 31st May, 1867. In reply to your communication of yesterday from the Bishop of *Winchester*, I beg you to inform his Lordship that, with all due deference to his authority, I see neither the necessity nor the obligation, under existing circumstances, of performing Divine Service at *Sydmonton*, and it is

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not my intention to resume the service there until every impediment be removed and the Church (so called) has been judicially decided to be lawfully consecrated. I have, moreover, to inform you that there is no Churchwarden at *Sydmonton,* and, therefore, no need to wait for a reply to any copy of a Letter or request to such to know whether his Lordship's order has been complied with or not."

The Bishop, finding that the Appellant had determined to continue to keep the Church at *Sydmonton* closed, and to disregard his order that the service in it should be resumed, instituted a suit against the Appellant in the Arches Court of *Canterbury,* under the provisions of the *Church Discipline Act* (3 & 4 Vict. c. 86). The Letters of Request stated, that the Appellant was charged with having offended against the Laws Ecclesiastical by having omitted to perform or to provide for the performance of public Divine Service as prescribed in the Book of Common Prayer, and administration of the Sacraments and other rites and ceremonies, in the Church of *St. Mary, Sydmonton* on four successive Sundays in the months of May and June, 1867, and, therefore, prayed that a citation might be issued to him to appear to answer to certain Articles, &c., to be administered.

The Appellant appeared under protest, and by an Act on Petition objected that by virtue of divers provisions contained in 1 & 2 Vict. c. 106, and more particularly in sections 77 and 109, the Court had no jurisdiction to administer Articles to him for the alleged offence of omitting to perform, or provide for the performance of, public Divine Service in the alleged Church of *St. Mary, Sydmonton;* that the Building called the *Church of St. Mary, Sydmonton,* is not a Church as falsely suggested; that an illegal ceremony of consecration had been performed within the Building; that the Appellant performed two full services in the Parish Church of *Ecchinswell-with-Sydmonton* on the Sundays mentioned in the Letters of Request, and that by reason of the premises the Court had no jurisdiction to entertain a suit to compel him to answer Articles for not performing divine service in the Building.

The Dean of the Arches (The Right Hon. Sir *Robert Phillimore*) overruled the protest, deciding that the offence charged was an Ecclesiastical offence cognizable under the provisions of the 3 & 4 Vict. c. 86, and assigned the Appellant to appear absolutely.

Articles were accordingly brought in, which charged the Appellant with having offended against the Common Ecclesiastical Law of the realm, and the Statute, 13 & 14 Car. 2, c. 4, s. 2, by omitting to perform Divine Service in the Church of *St. Mary, Sydmonton,* at the times mentioned, and copies of the before-mentioned Letters between the Bishop's Secretaries and the Appellant were annexed to and made part of the Articles.

The answer to the Articles principally consisted of a denial of any liability on the Appellant to perform any Divine Service in *St. Mary's, Sydmonton,* on the ground of its being an unconsecrated Building, and a justification for the omission charged, by reason of his having performed two full services in the Church of *Ecchinswell.*

The Dean of the Arches held, that the Bishop had rightly exercised his discretion in commanding the Appellant to perform Divine Service in the Church at *Sydmonton,* and admonished him to obey the directions of his Ordinary.

Upon the hearing of the appeal from this judgment, the Appellant in person urged various objections, some of which were of an extremely frivolous character. He insisted upon the illegality of the consecration of the Church at *Sydmonton,* for which objection, as already shewn, there is no foundation. He also objected that an ancient footway or entrance to the Church had been stopped up by the Patron, and a more circuitous road provided, and that it is by sufferance of the Patron only that the former approach can be used. It is clear that no defence against the present charge can be rested upon this circumstance. If there has been any improper obstruction of a right of way to the Church, the Appellant has his appropriate remedy.

But the Appellant principally rested his defence to the proceedings against him upon the ground that there being two Churches or places of public worship in the Parish of *Ecchinswell-with-Sydmonton,* he had a right to shut the Church against the Parishioners of *Sydmonton,* if, in his discretion, he considered it more expedient to confine the public worship in the Parish to the Church at *Ecchinswell.*

The question is, whether by so acting and persevering in keeping the Church at *Sydmonton* closed in disobedience to the order of the Bishop, he has committed an Ecclesiastical offence.

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The duty of the Appellant is thus stated in the first Article: That by the Common Ecclesiastical Law of the realm, and by the Statute, 13 & 14 Car. 2, c. 4, s. 2, every Clerk in Holy Orders of the United Church of *England* and *Ireland* is bound on every Sunday (otherwise called Lord's Day) in the year to perform, or to provide for the performance of, public Divine Service, as prescribed in the Book of Common Prayer, and administration of the Sacraments and other rites and ceremonies, according to the use in the Church of *England*, in every consecrated Church or Chapel of the Ecclesiastical Parish or Benefice of which he is the Incumbent.

It appears to their Lordships that the *Act of Uniformity* (13 & 14 Car. 2, c. 4), does not apply to this case, and that it is not a duty imposed by that Act upon an Incumbent who has two Churches or places of public worship within his Parish to perform Divine Service in both of them.

The words of the Act, "Every Church, Chapel, or other place of public worship within this Realm of *England*," must be read—in each Church, &c., in and for which there is a distinct Minister. The Appellant cannot, therefore, be said to have offended against the *Act of Uniformity* by confining the performance of morning and evening service to one of the Churches in his Parish, and not providing for the same services in the other Church, there being nothing in the Act requiring him to employ a Curate, in order that the services may be duly performed in both Churches.

But the question is, whether the Appellant was not bound by the Common Ecclesiastical Law (to use the language of the Articles) "to perform, or to provide for the performance of, public Divine Service" "in every consecrated Church or Chapel of the Ecclesiastical Parish or Benefice of which he is the Incumbent." If so, the Article which charges an offence against the Common Ecclesiastical Law, and also against the Statute, 13 & 14 Car. 2, c. 4, will be good, although the offence is only against the Common Ecclesiastical Law, and not against the Statute, as the latter allegation may be regarded as mere surplusage.

There can be no doubt that the Order in Council which united the Chapelries of *Ecchinswell* and *Sydmonton* into a separate Parish or Benefice, intended that there should be two Churches (as they are called in the Order) within the Parish, in both of which public

worship should be performed. This appears plainly from the provisions contained in the Order "that the Parishioners of *Ecchinswell* and *Sydmonton* should be liable, as theretofore, to the expenses of repairing and maintaining their respective Churches and the other expenses incidental to the due performance of Divine Service therein respectively," and "that the Parishioners of *Ecchinswell* and *Sydmonton* shall be entitled as heretofore to accommodation in their respective Churches."

The Appellant accepted the Benefice with a full knowledge that there were two Churches or Chapels within the Parish in which, by the instrument creating the Benefice, the duty of using each as a place of religious worship, and performing some service therein, is laid upon him. If the question with the Bishop had been as to the nature and extent of the services which the Appellant was bound to perform in these Churches respectively, the case might have been attended with more difficulty. But the Appellant takes upon himself to shut up the Church at *Sydmonton*, and positively to refuse to perform any Divine Service in it, assigning reasons for this wilful neglect of the duty which he has undertaken, every one of which is insufficient, and claiming the liberty of choosing which of the two Churches in his Parish he will keep open for Divine Worship, which, if it were conceded to him, would, of course, equally enable him to close the Church at *Ecchinswell*, and perform the whole of the divine services in the Parish in the Church at *Sydmonton*.

If, then, the Appellant has neglected or refused to perform a spiritual duty which was imposed upon him by his induction into the Benefice, has he not committed an offence against the Ecclesiastical Law? This in itself might render him liable to be proceeded against under the *Church Discipline Act*. But, beyond his neglect of duty, he has exposed himself to such a proceeding by his contumacious refusal to obey the lawful order of his Bishop. The duty of performing some Divine Service in the Church at *Sydmonton* having been imposed upon the Appellant, and he having shewn his intention of violating it by shutting up the Church and giving public notice that there would be no more service there, the Bishop, in the exercise of the authority vested in him, made an order upon him to resume the services in that

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Church. If the Appellant had entertained a sincere wish to do his duty to the Parishioners, he would have consulted the Bishop as to the best mode of meeting their requirements and his own obligation; but instead of adopting this course he defied the Bishop's authority under the semblance of deference to it, and denying the necessity and the obligation of performing any Divine service at *Sydmonton*, expressed his intention not to resume the service there "until the Church (so called) had been judicially decided to be lawfully consecrated."

The Appellant, therefore, has committed an offence against the Common Ecclesiastical Law, by wilful neglect of duty, and by wilful disobedience to the order of the Bishop directing him to perform that duty.

In his act or protest, the Appellant objected to the jurisdiction of the Court upon the ground, that the proceedings should have been taken (if at all) under the 1 & 2 Vict. c. 106, referring to sects. 77 and 109 of that Act. It may be doubted whether the Act referred to is applicable to this case. By the 77th section it is provided, that whenever the Bishop shall see reason to believe that the Ecclesiastical duties of any Benefice are inadequately performed, it shall be lawful for him to issue a Commission, to be constituted in the manner prescribed; and if the Commissioners report to the Bishop that in their opinion the duties of such Benefice are inadequately performed, he may require the spiritual person holding the Benefice to appoint a Curate.

And the 109th section enacts, that in every case in which jurisdiction is given to the Bishop of the Diocese, or to any Archbishop, under the provisions of this Act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdictions in respect thereof shall wholly cease; and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the Bishop and Archbishop under this Act.

It may be open to doubt, whether the shutting up one of two Churches in a Parish where Divine Worship is required to be performed in both, comes within the meaning of the words, inadequate performance of Ecclesiastical duties, and can be dealt with

as falling under the 77th section. But assuming that it might, if the act done involves an Ecclesiastical offence, does the 109th section of the 1 & 2 Vict. c. 106, compel the Bishop to adopt the course pointed out by the Statute, not for visiting the offence, but for enforcing the proper performance of the duties which, by reason of the offence, have been inadequately performed? The words of the 109th section are, "that no other jurisdiction in relation to the provisions of this Act shall be used." Therefore, if the Bishop were proceeding to compel the Appellant to appoint a Curate, he must have pursued the course prescribed by the Act, and have issued a preliminary Commission of inquiry. But his proceeding being for an offence committed by the Appellant against the Common Ecclesiastical Law, the jurisdiction of the Court is not taken away by the 109th section, and the suit is properly instituted under the *Church Discipline Act.*

Their Lordships are of opinion, that the Appellant by shutting up the Church at *Sydmonton*, and refusing to perform Divine Service there, notwithstanding the mandate of the Bishop, has committed an Ecclesiastical offence, and they will, therefore, humbly recommend to Her Majesty that the sentence of the Arches Court should be affirmed, and the appeal dismissed with costs.

Proctors for the Appellant: *Brooks & Co.*
Proctors for the Respondent: *Moore & Currey.*

J. C.* 1868 Nov. 28, 30.

JAMES MOSS & Co. AND OTHERS, THE OWNERS OF THE SCREW STEAMSHIP "ROSETTA" . } APPELLANTS;

AND

THE AFRICAN STEAM SHIP COMPANY, THE OWNERS OF THE STEAMSHIP "CALABAR" . . . . . } RESPONDENTS.

THE "CALABAR."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship and Shipping—Collision—Compulsory Pilotage—Sole responsibility of Pilot—Practice—Effect of not adhering to appeal.

Post 248

In a case of collision occasioned by a Vessel under compulsory pilotage, where no contributory negligence on the part of the Master and crew is proved, the Pilot in charge is solely responsible, and the Owners are exempt from the consequences of his neglect or default.

It is the province of the Pilot in giving directions for the navigation of a steam Vessel of which he is in charge, to determine the rate of speed at which she should proceed.

Semble, the Owners of the Vessel proceeded against, and decreed to be solely to blame, having been dismissed from the suit by reason of the Vessel being in charge of a compulsory Pilot; and having neither appealed from the decree nor adhered to the appeal brought by the Owners of the Vessel injured (the Plaintiffs in the Court below), cannot, in such circumstances, raise the questions whether their Vessel was free from blame, or whether both Vessels were equally in fault, but are confined to the points raised by the appeal, whether the Pilot was solely to blame, or whether there was not contributory negligence on the part of the Master and crew of the Vessel causing the damage.

THE suit in which this appeal was brought arose out of a collision which occurred between the screw steamship *Rosetta*, owned by the Appellants, and the screw steamship *Calabar*, belonging to the Respondents. The collision occurred at about a quarter past nine, on the morning of the 2nd of January, 1867, in the river *Mersey*, near the entrance to the *Sandon Basin*. The *Calabar* was on a voyage from *West Africa* to *Liverpool*, had

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE WOOD, and THE LORD JUSTICE SELWYN.

arrived in the *Mersey*, and was proceeding up the river in charge of a duly licensed *Liverpool* Pilot, and was about to call at the *Huskisson Dock Pier* for the purpose of ascertaining where she was to be berthed. As the *Calabar* approached the *Huskisson Pier Head*, the *Rosetta* was seen to be coming rapidly out of the *Sandon Basin* into the river. By order of the Pilot the engines of the *Calabar* were at once reversed full speed, and her helm was put hard a-starboard, but a collision ensued, the *Calabar* with her stem striking the *Rosetta* with her starboard side about midships.

It was admitted by the Appellants, that the *Rosetta* had started to come out of the *Sandon Basin* into the river, with her engines at full speed, without anyone on board of or belonging to her having previously made any attempt to ascertain whether by so doing she would endanger any other Vessel, and without having noticed the proximity of the *Calabar*. The defence of the Respondents was, first, that the *Rosetta* was wholly in fault; secondly, that if not wholly in fault, she was partially in fault; thirdly, that the *Calabar* was not either wholly or partially in fault; and lastly, that if any blame was to be attributed to the *Calabar*, such blame was solely attributable to her licensed Pilot, whom by compulsion of law the Respondents had taken on board, upon the ground that her Master and crew had kept a sufficient look-out, and promptly obeyed the orders of the Pilot, who had regulated her speed and position in the river, and otherwise conducted her navigation.

The suit was heard before the Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*), with the assistance of two of the Trinity Masters, and, with the exception of one witness, who was examined before an Examiner, all the witnesses were examined orally in open Court, and on the 18th of November, 1867, the Judge, having consulted with the Trinity Masters, pronounced the damage to have been occasioned by the sole default or incapacity of the Pilot of the *Calabar*, and as the employment of such Pilot was compulsory by law, dismissed the Respondents from the suit.

From this decree the present appeal was brought.

Mr. *Butt*, and Mr. *V. Lushington*, for the Appellants,

Submitted, that the decree of the Court below was wrong, and

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ought to be reversed, as the evidence did not support the finding of the Court, and did not warrant the decree. They insisted that, on an examination of the evidence, it shewed negligence on the parts of the Owners of the *Calabar* or their servants in not keeping a good look-out, and in not duly reporting the *Rosetta* to the Pilot, and in not duly obeying the directions of the Pilot, and they maintained, that the Master and crew were further to blame in navigating in the place in question a Vessel alleged to have been so faulty in construction that she would not properly answer her helm, and not having duly informed the Pilot of the peculiar difficulty of steering their Vessel; and they contended that the *Calabar* at the time of the collision was proved to have had headway upon her, by the neglect and default of her Master and crew, and contrary to the orders of the Pilot.

They further insisted, that the Respondents, not having appealed from the decree, or adhered to the appeal now brought, for the purpose of the appeal it must be assumed that the *Calabar* was solely to blame; and that the only question was, whether the negligence was solely and entirely that of the Pilot of the *Calabar*, or whether there was contributory negligence on the part of her Master or crew; and that the Respondents were not at liberty to argue now that there was no fault in the *Calabar*, or that both Vessels were in fault.

Dr. *Deane*, Q.C., and Mr. *E. C. Clarkson*, for the Respondents,

Contended, first, that the decree of the Court below ought to be affirmed, on the ground that it was satisfactorily proved that the collision was not in any way caused or contributed to by the Master or crew of the *Calabar*, but that it was occasioned and brought about either by the default or incapacity of the Pilot on board the *Calabar*, or of those having the care and direction of the *Rosetta*; that the Pilot having charge of the *Calabar* by compulsion of law, the Respondents were not responsible for the consequences of his default or incapacity, if any. They cited and relied on *The Iona* (1).

Secondly: They submitted, that they were entitled, notwithstanding they had not appealed, to insist that the *Calabar* was in

(1) Law Rep. 1 P. C. 426.

no respect to blame for the collision, and that if any blame was to be attributed to her, the *Rosetta* was equally in fault.

Sir James W. Colvile:—

It must be assumed for the purpose of this appeal, and their Lordships see no reason to doubt the fact, that the *Calabar* was solely to blame for the collision in question. It is, however, an admitted fact in the case, that she was then in charge of a licensed Pilot; it being compulsory upon the Master to take a Pilot in the river *Mersey*. The question, therefore, is reduced simply to that which has been so often agitated here and in the Court of Admiralty, whether the Master and crew of the *Calabar* have sufficiently relieved themselves of the obligation which the law casts upon them, of shewing that the accident was due solely to the neglect of the Pilot, and that there was no neglect on their part which contributed or conduced to that accident. It is unnecessary to go into the cases on this subject. They were recently considered in the case of *The Iona* (1) at this Board, and to the law as there laid down, their Lordships wish to adhere.

Now, what is the fault which the decree below imputes to the *Calabar?* It is that the Vessel was proceeding at a far greater speed than was consistent with safety, considering the circumstances and the position of the Vessel. Their Lordships think that that conclusion was right; they certainly see no ground for disturbing the decree on that point, supposing it were open to the other party to do so. There was, no doubt, conflicting evidence as to the rate of speed, but the evidence on the part of the Master and crew of the *Rosetta* was confirmed by the evidence of three independent witnesses. But on this part of the case it is only material for the present purpose to remark, that the fault thus found is *primâ facie* the fault of the Pilot. For it was the duty of the Pilot, in giving directions for the navigation of the Vessel, to determine the rate of speed at which she should proceed. We have then to consider, whether the evidence to which our attention has been drawn by the able arguments at the Bar, discloses any neglect of duty on the part of the Master or crew of the *Calabar*, of which their Lordships can fairly predicate that it was negligence

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which contributed or conduced to the accident. In dealing with that question, we must assume that all those circumstances, from which we are asked to infer neglect on the part of the crew, were fully considered by the learned Judge of the Court below, and that, although he has not entered at length into his reasons for coming to that conclusion, he did in fact come to the conclusion, that the Master and crew were not shewn to have been guilty of any negligence which would affect the Owners of the *Calabar* with liability.

The argument at the Bar has proceeded upon three grounds. It was argued first, that there was not that look-out which there ought to have been on board the *Calabar*. It was said, in particular, that if the persons charged with that duty had exercised a proper degree of diligence they would have seen that this Vessel, the *Rosetta*, was coming out of the Dock when they were crossing the river, and would have given notice in time to enable the Pilot to manœuvre the *Calabar* so as to avoid the accident. The Appellants' Counsel have also imputed another act of negligence to the look-out; but having regard to the ground upon which their Lordships proceed, that point will apply to both instances of imputed negligence. Their Lordships have consulted the Nautical Assessors by whom they are assisted, and have come to the conclusion that the observation of the *Calabar* was hardly within the proper duty of the look-out men. They are stationed to see what Vessels or obstacles are in the Channel; and their attention is directed rather to such objects than to what is taking place on the shore. We are not prepared to impute negligence to the look-out, properly so called, because it is not shewn that the existence of this Vessel in the basin, with its blue-peter flying, was made known by them to the Pilot on the bridge before the time at which he and the Master are proved to have observed it. We, therefore, think that the first ground taken fails to establish negligence conducive to the accident against the Master or crew of the *Calabar*.

The third point taken (and we will take it before the second) was, that if this Vessel were really of so eccentric a character as to steer in the manner to which we shall afterwards revert, that was a circumstance which should have been made known to the Pilot. Now, we are not prepared to affirm that there was any

extraordinary eccentricity in the Vessel; and, as far as the evidence goes, it seems reasonable to presume that the communication as to the nature of the screw, which the Captain of the *Rosetta* says is a thing generally told to a Pilot when he takes charge of a screw-steamer, was made to this Pilot. In one part of his evidence the Pilot himself says that he knew what the nature of the screw was.

We come now to the second point taken, being that which was chiefly insisted upon by the Appellants' Counsel, and was argued with great force and ability. It is this:—the witnesses for the *Calabar* depose that the order given by the Pilot immediately, or shortly before the collision, was to put the helm hard a-starboard. It is, nevertheless, clear upon the evidence that, at the time when that order is said to have been given and executed, the head of the Vessel paid off to starboard, as if she had been under a port helm; and from this fact the Appellants would have their Lordships infer that the men at the wheel did not, in fact, obey the Pilot's order, but ported when they should have starboarded the helm. The witnesses for the *Calabar* have sought to establish, that this motion of the Vessel on a starboard helm was due to the reversal of the engines, and the consequent action of the screw.

This explanation appears to their Lordships to be very unsatisfactory, because we must take it on the evidence that there was a considerable way upon this Vessel; and, in that case, there seems to be no reason for supposing that the reverse action of the screw would prevent the vessel from answering her helm in the ordinary way, so long as there was way upon her. We have, however, the advantage of being assisted by Nautical Assessors who have fully considered the evidence and the facts, and it seems to them and to their Lordships, that the motion of the Vessel may be accounted for consistently with the evidence in another way. If the fact were incapable of explanation except upon the hypothesis suggested by the Appellants' Counsel, we should be driven to the painful necessity of supposing that the evidence given on the part of the *Calabar* is altogether and wilfully false, and that either the order which the Pilot swears he gave, and the other witnesses swear he gave, was not given, or that that order was deliberately disobeyed. That it should have been disobeyed—that the men at the wheel

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should have done the opposite of what they were told to do—is *primâ facie* extremely improbable. The following view of the case appears to their Lordships, upon the information which they have received from their Assessors, to be far more probable.

There is some evidence that the Vessel, when she was passing along this wall, was at one period under a port-helm. She was going faster than she ought to have gone. She must have been, in their Lordships' view, very near the mouth of the basin when the order to hard a-starboard was given. And if, as was suggested in the argument, she was then seeking to run past the mouth of the basin, she was probably more under the influence of a port-helm than the Pilot admits her to have been. Their Lordships are informed that, in such circumstances, some time would elapse before the helm, when shifted, would act on a Vessel of that size, and that, therefore, it is not impossible that her head may have gone off in the way in which it is sworn to have gone off by almost all the witnesses, although the order hard a-starboard was given and obeyed. In that state of things the Pilot would be solely responsible for the improper navigation of the Ship. Their Lordships, therefore, are unable to come to a contrary conclusion to that to which the learned Judge in the Court below came to, or to hold that the case of contributory negligence on the part of the crew has been made out; and, seeing no sufficient reason for disturbing the decree of the Court below, they must follow the ordinary course, and humbly advise Her Majesty that the decree be affirmed, and the appeal dismissed with costs.

Their Lordships desire me to add that, although that point may not be considered to have been fully argued before them, they have, as at present advised, a very strong opinion that it would not have been open to the Respondents, who have not adhered to this appeal, to raise the question whether the *Calabar* was free from fault, or whether both Vessels were in fault.

Proctors for the Appellants: *Pritchard & Sons.*

Solicitors for the Respondents: *Oliverson, Peachey, Denby, & Peachey.*

JOHN REID, OWNER OF THE STEAMSHIP "ALICE" . . . . . } APPELLANT;

AND

THE ABERDEEN, NEWCASTLE, AND HULL STEAM COMPANY, OWNERS OF THE STEAMSHIP "PRINCESS ALICE" . . . . . } RESPONDENTS.

J. C.*
1868
Nov. 30.

THE "ALICE" AND THE "PRINCESS ALICE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Appeal involving question of fact only—Practice—Reluctance of appellate Court to disturb finding of Court below.

Though the Judicial Committee will not lay down any exclusive rule as to appeals from judgments of the Court below upon questions which are entirely of facts; yet they are most reluctant to come to a conclusion different from that of the Judge of the Court below, merely on a balance of testimony; the Judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses.

Where, therefore, in a cause of collision in which the evidence was entirely oral, and the Judge of the Court below, assisted by Trinity Masters, determined on the evidence which Vessel was in fault, and decreed damages accordingly: the Judicial Committee approving the finding, affirmed that judgment, and dismissed the appeal with costs.

The case of *The Julia* (1), where the same principle is laid down, approved.

THE appeal in this case was brought from an interlocutory decree of the High Court of Admiralty, in a suit and cross suit, instituted respectively by the Owners of the *Alice*, and the Owners of the *Princess Alice*, for damages claimed by each against the other, arising out of the same collision.

As the pleadings in the two suits raised the same question, the two suits were heard by the Court below at the same time and upon the same evidence.

The collision occurred between 6.30 P.M. and 7 P.M., on the

* *Present:*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE WOOD, and THE LORD JUSTICE SELWYN.

(1) 14 Moore's P. C. Cases, 210.

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15th of November, 1867, in the river *Tyne*, at or about a place called the *Narrows*. The *Princess Alice* was coming up, and the *Alice* was going down the river. Both Vessels had the usual regulation masthead and coloured side-lights exhibited, and burning.

The case on the part of the *Princess Alice* was, that she was proceeding, under steam, slowly and carefully up the north side of the river, that being her proper side; that the red and masthead lights of the *Alice* were seen on the port bow, and at the distance of about a quarter of a mile from the *Princess Alice;* that the helm of the *Princess Alice* was ported, and that upon the green light of the *Alice* coming into view, the engines of the *Princess Alice* were stopped; but the *Alice* with her stern struck the *Princess Alice* with great violence on her port-midships, doing her so much damage that her Master was compelled to run her ashore to save her from sinking. The Respondents, the Owners of the *Princess Alice*, alleged the collision to have been occasioned by the improper navigation of the *Alice*, and they charged the *Alice* with four distinct grounds of blame:—first, with not having navigated on the south side of the river; secondly, with having omitted to duly port her helm; thirdly, with having improperly starboarded; and, fourthly, with having improperly neglected to slacken her speed or to stop or reverse her engines.

The Appellant, the Owner of the *Alice*, on the other hand, alleged that the *Alice* was keeping as close along the south shore as was practicable; that the *Princess Alice*, instead of being on the north side of the river, was improperly coming up on the south side, and even further over to that side than the *Alice* herself was, and that the *Princess Alice* brought about the collision by altering her course under a port helm, and bringing herself across the bows of the *Alice*.

With the exception of one witness, who was examined and cross-examined before an Examiner of the Court, all the witnesses were examined orally in open Court.

The Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) had the assistance of two of the Elder Brethren of the Trinity Corporation, and, after consulting with them, by his decree pronounced the *Alice* to have been solely to blame for the collision.

The Appellant and Respondent appealed in their respective suits, and the two appeals were heard together.

The *Queen's Advocate* (Sir *Travers Twiss*, Q.C.), and Mr. *Butt*, for the Owner of the *Alice*.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Owners of the *Princess Alice*, were not called on by their Lordships.

The case of *The Julia* (1) was referred to.

THE LORD JUSTICE WOOD:—

In the course of the argument on this case, one of their Lordships has cited the decision in the case of *The Julia*, which laid down in very clear and precise terms the course that this Committee thinks it right to take with reference to appeals from decrees of the Court below upon matters which are entirely matters of fact. If this Board finds that in the Court below there was clear and distinct evidence upon the one side, and possibly evidence which the Appellant might think to be as clear and distinct on the other side, nevertheless, if the Judge in the Court below, in his discretion, having the opportunity of seeing the witnesses and observing their demeanour, has come, on the balance of testimony, to a clear and decisive conclusion, those who undertake to reverse that conclusion, on the ground that the Judge has erred in giving credence to the one class of witnesses rather than to the other, undertake, as expressed in the case of *The Julia*, an almost impossible task. This Committee has no opportunity of seeing the witnesses, of considering in what respect credence should be given to one class rather than the other from the mode in which their evidence has been given; and it would have to perform a duty of a most painful character if it were not merely to reverse the decision of the Judge below with reference to the finding that he has come to adverse to the Appellant, but had, in such a state of circumstances, to do that which would be a necessary corollary from such a step, viz. to give a deliberate judgment in favour of the Respondent, without the same means of ascertaining the real

(1) 14 Moore's P. C. Cases, 210.

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truth as was possessed by the Judge of the Court below. Now, it is of course not wise at any time to lay down rules of such extreme accuracy of definition as would induce a Court of appeal to hold itself bound upon any future occasion to a fixed and determined line which cannot be overpassed on the one side or the other. We have had to consider that question on a different subject matter in the course of this very day, with reference to the course taken by this Committee as to the augmentation or diminution of the amount awarded in salvage cases (1). A useful line has been drawn by that case with reference to our proceedings in such a case as this, viz. that it requires a case of extreme and overwhelming pressure to induce this Committee to vary from the decision of the Court below as to the amount of damage with reference to salvage. Still such a case may occur; this Committee has only recently so decided in a similar case (2). It is just possible to suppose that other cases might occur with reference to this very question of evidence, and it might be possible to shew that the Judge below had so plainly, manifestly, and clearly erred upon the face of the evidence that we ought to reverse his judgment. But it is not shewn on the face of the evidence in the case before us, either from the character of the deposition of the witness whose veracity it is sought to impugn, or from what we find recorded upon his evidence, that his testimony is so utterly inconsistent in itself, so contrary to all human probability, that a Judge must have been guilty of error who could give credit to a witness of such a character.

But, on the contrary, what we are asked to do is this,—we are asked to reverse the decree of the Court below in a case in which the principle established by the decision in *The Julia* (3), is most singularly applicable, because the learned Judge, finding a conflict of testimony, as unfortunately in most of these cases of collision there must always be, has relied very strongly on the evidence of a Pilot, a witness of the name of *William Young*, and has thus characterised that witness's evidence. He says, he has had the assistance of the Elder Brethren of the Trinity House, and he gives it as the joint opinion of those Gentlemen and of himself,

(1) *The Chetah*, *ante*, p. 205, and see *The England*, *post*, p. 253.

(2) *The Calabar*, *ante*, p. 238.

(3) 14 Moore's P. C. Cases, 210.

"that *William Young*, the witness from the Tug *Mary Usher*, whose evidence has been very much discussed, proves that the *Princess Alice* was running up on the north side of the channel. It has been very properly admitted that this witness gave his evidence in a manner which entitled him to the credence of the Court; and he proves, in my opinion, beyond all controversy, that the *Mary Usher* came up on the north of the mid-channel, with the *Princess Alice* between her and the north shore, as far as the *Middle Scarp Sand*, and that there the Tug passed ahead, and was proceeding onwards up the river. He says also, that he looked back, and saw the collision, and that the *Princess Alice*, at the time of the collision, was still to the northward of the mid-channel. He gave strong evidence also to this effect: that the *Mary Usher* having passed the *Alice*, he observed that she altered her course, and came across towards the north shore. He said that his belief was, that those on board the *Alice* had not seen the *Princess Alice*, and that their attention was occupied with the Dredgers and Hoppers which were on the south shore." Therefore, the learned Judge tells us, that this is a witness who is not only unconnected with the case, but a witness who has given his evidence in a manner peculiarly entitling him to credence in the opinion of the learned Judge and his Assessors; and, indeed, he says (and we have no reason to suppose that it is in any way an error) that he was admitted so to have given his evidence. If that be so, we entirely concur in the observation of the learned Judge, that the evidence of that witness may properly be applied to turning the balance of the conflicting evidence, such as it may be, upon the rest of the case. He has been worthily adopted as a witness of credit, whose evidence ought materially to assist the Judge in coming to the conclusion which he came to, founding it in a great measure undoubtedly upon that person's evidence. Have we then been shewn anything in his evidence which, to our minds, makes it clearly erroneous that such weight should have been given to the evidence of that particular witness? Does not his evidence, if believed, prove the case? Clearly and manifestly it does, because his evidence is to this effect, that he himself was somewhere about mid-channel, or slightly on the north side of the river, being in a Tug called the *Mary Usher*, which was so situated because it had

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been looking out for a job at the time when the *Princess Alice* was coming up; he had found that the *Princess Alice* was in the hands of a certificated Pilot, and did not want his assistance as a Pilot; and he says that he then went for some time alongside, as it were, of the *Princess Alice*, but finding that she went slower than he was desirous of doing, or, rather, than the Tug was desirous of doing, for he does not appear to have been in command of the Tug, the Tug went ahead; but at the same time, he says, up to the time of his going ahead, the *Princess Alice* was on the north side of him, and clearly on the north side of the mid-channel, and in her proper position. Now, is he not confirmed in that? It is curious enough that the witness *Reid*, speaking of a Vessel which he does not name, but which clearly is, and was stated by the Queen's Advocate to be, the *Mary Usher* in which *Young* was—says that the Tug which then passed him was on the north or proper side of the river, and was proceeding in her proper course. The Captain of the *Alice*, himself, also described the *Mary Usher* as coming up about the same time; therefore, it is plain that she was on the right side of the river, and that the *Princess Alice* was to the north of her, and, if we may use such an expression, more in her right place than the other. Well, that being so, it is said, how came he to be so near as to be capable of giving the exact account which he does of this collision? Of course, it is a remark fit and proper to be made on all occasions with reference to observations made by strangers, that you must have some sort of explanation as to what it is that causes them to take notice of a matter which by itself would be uninteresting to them, such as the position of the other Vessel. But this witness gives you abundant reason for having taken this notice, because he had advanced but a very little way, and the Captain says, that the *Mary Usher* passed him when they were close to the Dredgers; therefore, the *Alice* was near the Dredgers, in the immediate vicinity of which the accident happened at the time she was passed by the *Mary Usher*, and the *Mary Usher* cannot have got very far before the collision took place; and this witness gives a very suitable and proper reason for seeing so much of it as he did, for he says: "When I felt that a collision was likely to take place, from noticing these Vessels, I immediately had the Tug I was in first stopped and then backed,

in order that I might be of use in saving life, in the event of any such collision occurring." What could be more natural, and what could be a more proper and reasonable account to give of his making the observation he did? Then by that operation he was brought so near, that there can no longer be any doubt of his having had abundant facilities for seeing what took place. He then gives a reason for what afterwards did take place, which meets the observation of the Queen's Advocate as to the improbability of this man's evidence. He explains the cause of the *Alice* passing out of her course, and throwing her head across the river towards the north, and so going on her wrong side at the time of the collision. His remark is this: "I think she did not see the *Princess Alice* Steamer." Now, it is a curious thing that the Captain of the *Alice*, in giving his evidence as to what he saw after the *Mary Usher* had passed, and on being asked when it was that he first saw the *Princess Alice*, gives this account. He says, "I saw some lights;" and then Mr. *Butt* asks, "What did you take those lights to be? *A.* A Steamer's lights.—*Q.* Any particular sort of Steamer? *A.* The Steamer attending on the Hoppers at the Dredgers.—*Q.* Did you see any Hoppers? *A.* Yes, there were two Hoppers.—*Q.* Where were the two Hoppers? *A.* Alongside of the Dredger." Therefore, he really indirectly corroborates this observation of *Young*, in itself not an unnatural one to make. Nobody would run across the river if they had seen a Steamer; of course nobody wished to occasion a collision or a disaster of this description; but he says, "I do not think he saw her;" and what turns out to be the case is this, the Captain is giving his own account of it:—On first seeing the *Princess Alice*, he did not take her to be a Vessel coming up the river with which he was likely to come into collision; but, judging by his eye, he thought it was a Tug in attendance on the Hoppers, and not, therefore, in the position of the *Princess Alice*, which was navigating and coming up the river. We mention these things, as shewing that so far from any ground having been laid to lead their Lordships to conclude that the Judge has erred in trusting to *Young*, because, on the face of his evidence, it is inconsistent and improbable, and, therefore, not such evidence as on the very face of it ought to be trusted to, it appears that all the collateral circumstances, as far as we have

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other evidence in the case, tend rather to assist and corroborate the view taken by the learned Judge as to *Young's* evidence. And I may say, in conclusion, that the map which was proved by *Hopper*, and which has been laid before us, shewing the position of the Vessels immediately after the accident, tends exactly to the same conclusion; because, as has been observed by one of their Lordships, it is difficult to see how such a state and position of the vessels could have been brought about upon any such theory as that presented to our minds by the Appellants, whereas it is entirely consistent with that presented by the Respondents.

But, in the opinion of their Lordships, the principal point upon which we should rest our decision is this, that following the doctrine laid down in the case of *The Julia* (1), we should be most unwilling to come to a conclusion different from that of the Judge of the Court below merely upon a balance of testimony; and on its being affirmed by the Appellant that the testimony ought not to have been credited by the Judge of the Court below. He had an opportunity of testing, in the most ample manner, the conduct and demeanour of the witnesses; and we should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made by any witness, and the general testimony to which credit has been so given, before we could venture to come to a conclusion not only in favour of an Appellant in a case of this kind, but of course a conclusion adverse to a Respondent; thus inflicting on the Respondent a loss occasioned by the Board coming to a conclusion different from that which was come to on evidence, as to the value of which we have not the same facilities and means of forming a judgment as were possessed by the learned Judge who decided in the first instance.

It is, therefore, our opinion that, we must advise Her Majesty, in this case, to affirm the judgment of the High Court of Admiralty, and to dismiss the appeal of the *Alice* with costs.

Proctor for the Appellant: *G. C. Ring.*
Proctors for the Respondents: *Rothery & Co.*

(1) 14 Moore's P. C. Cases, 210.

JOHN PRENDIVILLE AND OTHERS . . . . APPELLANTS;
AND
THE NATIONAL STEAM NAVIGATION COMPANY, THE OWNERS OF THE SHIP "ENGLAND" . . . . . } RESPONDENTS.

J. C.*
1868
Dec. 1.

THE "ENGLAND."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Shipping—Salvage services—Amount awarded—Discretion of Judge, on appeal not in general interfered with.

In reviewing decisions in salvage suits in respect of the sums allotted by the Admiralty Court for salvage services, where there is more than one salving Vessel, the Judicial Committee, adhering to the rule laid down in *The Clarisse* (1) and *The Neptune* (2), will not, unless under strong circumstances, interfere with the judicial discretion of the Judge of the Court below.

IN the Admiralty Court, the Appellants, the Owners of the Steam-tugs *Knight Templar* and *Royal Arch*, sued the ship *England*, her freight and cargo, for salvage services.

The following facts respecting the salvage services were proved at the hearing:—

The *England* was an iron screw-steamship, about 376 feet in length, and 2,249 tons net, and 2,596 tons gross burthen, and having a heavy cargo on board. She was drawing twenty-one feet nine inches. The value of the Ship, freight, and cargo was £122,820. A gale caught a Tug called the *Phœnix* on her port bow as she was towing the *England* out of the *Wellington* into the *Sandon Basin*, in the River *Mersey*, and blew the Tug out of position, and she fell against the hawser that was passed from the bow of the *England* to the pier, and carried away her funnel, masts, and rigging, and drifted disabled into the *Wellington Basin*. Shortly afterwards the hawser from the *England's* bow broke, and the Ship drifted to the eastern part of the *Sandon Basin*, and, after attempts

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE PAGE WOOD, and THE LORD JUSTICE SELWYN.

(1) 12 Moore's P. C. Cases, 340. (2) 12 Moore's P. C. Cases, 346.

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to hold her had failed, she finally got fixed in an angle across the north-east corner of the *Sandon Basin*, with her head against the *Huskisson Dock* entrance, and her stern across the entrance to the *Sandon Dock*, having thus the whole of the gale on her port side, which held her fast in the position into which she had fallen. There being no Tugs there at that time to render her any assistance, and the tide having commenced to ebb, an attempt was made to get her into the *Sandon Dock* stern first by means of the hydraulic capstan. This attempt failed, and Rockets were then sent up, and blue lights burnt as signals of distress for Steam-tugs. Nothing but Steam-tug assistance could then extricate the *England* from the position she was in.

The Steam-tug *Rocklight* came first; but she could not render any assistance, and got out of position. The Tug *Retriever* came next, and made fast to the *England;* but she could do nothing by herself, and got out of position. The *Knight Templar* was the next Tug that came; and she got hold of the *Retriever*, and eventually these two Tugs got the *England* partly away from her position against the wall previously described. Before, however, venturing into the river, the *Royal Arch* was made fast to the *Knight Templar*, to prevent the other Tugs being swept down the river by the strong ebb tide, and to give additional power to the towing of the *England*. The three Tugs brought the *England* safely out of the Basin into the River at about one hour and a quarter's ebb, when there was only just sufficient water to float the ship. If she had not been got out then she would have grounded in the Basin.

It was alleged that, if the *England* had grounded while lying in an angle across the north-east corner of the *Sandon Basin*, or while coming out of the Basin, she would in all probability have broken her back. She certainly would have sustained considerable straining and twisting, and might have much damaged herself and injured her cargo. The Steam-tug *Knight Templar* ran, it was said, considerable risk of damage while in the Basin, and in coming out in such a sea and gale, and with such a tide, having little steerage way on her.

The Judge of the Court of Admiralty (The Right Hon. Sir *Robert Phillimore*) awarded to the Appellants for their services the sum of £80.

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The Appellants appealed against the decree of the Court below, on the ground that the amount awarded was inadequate for the services rendered.

Mr. *Aspinall*, Q.C., and Mr. *V. Lushington*, for the Appellants, contended,

That the Appellants, by their Tugs and their own skilful personal services, had rescued property to the value of £122,820, from a position of great and imminent danger; that they were under no duty to render service to the *England*, but acted as Volunteers on salvage terms, and that, if their services had proved unsuccessful, they would have had no claim for reward, neither could they have recovered for any damage the Tugs might have sustained in their endeavours to render assistance; and they urged that, as the building of large Steam-tugs for salvage services, and keeping them always in readiness, is attended with great expense, it was for the interest of maritime commerce that such enterprise should be encouraged by liberal remuneration for salvage services, if successfully performed by such Tugs; and that the award decreed by the Court below was in point of amount inconsistent with the principles and practice of the Court of Admiralty in like cases. They cited and relied on *The Saratoga* (1).

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the Respondents, were not called on.

THE LORD JUSTICE SELWYN:—

Their Lordships had occasion so very recently to consider the principles upon which this Board acts in reviewing the decisions of the Judge of the Court below, in respect of sums allotted for salvage services, that it would be quite unnecessary to go again through the authorities. But their Lordships think it material to observe that, in the judgment which was pronounced yesterday (2), it was not the intention of this Board to enunciate, nor in terms did they enunciate, any new principle; but that judgment consisted mainly of a citation of the previously existing authorities, and to those authorities, then and now, their Lordships are determined to

(1) Lush. 318. (2) See *The Chetah*, *ante*, p. 205.

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adhere. It is unnecessary to refer to them at any length, but there are two principal ones in the twelfth volume of *Moore's* Privy Council Cases, pp. 340, 346,—*The Clarisse*, and *The Neptune*. In the latter case, Lord *Kingsdown*, in expressing the opinion of this Board, says, "It is a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of appeal to interfere upon a question of mere discretion." That which we, therefore, have to determine is, whether it is right in the present case for us to interfere with the judicial discretion which has been exercised by the Judge of the Court below?

Now, it has been justly observed, that we have first to consider the position of danger and difficulty in which the property that was rescued was at the time; and in the argument it has been contended, that this Ship, the *England*, was in a position of very great difficulty and danger, and the case of *The Saratoga* (1) has been cited as an analogous case. Their Lordships think that case is very useful by way of contrast to the present case; because here, although there was no doubt a gale of some violence blowing (the witnesses differed as to the extent), it must always be remembered that this Ship was a Ship with its own steam-power perfectly ready to be exercised—a Ship in a condition to go to sea, which had met with no casualty whatever, and which was not only within the harbour and within the river, but actually within the *Sandon Basin*, no doubt in a position of considerable difficulty. Therefore, it may fairly be said she was in a position which might expose her to some considerable risk of detention, and possibly to some risk of loss, by straining or otherwise; but she was not, by any means, in the position in which *The Saratoga* was, that having been a Ship which was in a dismasted and crippled condition. It is admitted here, that if she had once got her head in the proper direction to the entrance into the river, she would, by means of her own unaided steam-power, have been able to proceed upon her voyage.

Then we have to consider the amount of risk. We are told in the argument that these Steam-tugs were rendering services of danger and peril to themselves. Their Lordships have consulted

(1) Lush. 318.

the Nautical Assessors upon this subject, and their opinion entirely concurs with that which their Lordships had formed for themselves on the evidence, namely, that the Tugs on this occasion incurred no danger and no peril. It appears that one Tug had already entered into an engagement to liberate this Vessel, and by reason of an accident which occurred to that Vessel in the peculiar circumstances in which she was placed, she had lost her funnel and her mast; but the other Tugs had merely come through the open entrance into the Basin, and then endeavoured to liberate the *England* from the position in which she was. It appears that a bargain was actually made with one of these Vessels, the *Rocklight*—a number of them having been collected together by the signals which had been sent up—to perform that very service; and there was no evidence to shew that the *Rocklight* was unable or unwilling to perform that very service, which is called a service of peril and danger, but which in our opinion was neither perilous nor dangerous, for a sum of £20; but by the superior skill or good fortune of the *Knight Templar*, the *Rocklight* was anticipated by the *Knight Templar*, and the *Knight Templar*, with the assistance of the *Royal Arch*, which performed a comparatively trifling service, succeeded in towing this Vessel in.

We think, therefore, considering the position in which the *England* was at the time, considering that the services rendered by the Tugs were rendered in what may be called the ordinary course of their business, and rendered in a manner which exposed them to no danger or difficulty, there is nothing whatever to induce this Board to believe that the sum which was awarded by the learned Judge was other than a reasonable remuneration for the services rendered. And then, when we consider the principle already referred to, that the difference ought to be very considerable to induce a Court of appeal to interfere on a question of mere discretion, we think there is no foundation for this appeal, and that it is our duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal with costs.

Solicitors for the Appellants: *Nethersole & Speechly.*
Proctors for the Respondents: *Toller & Sons.*

J. C.* 1868 Dec. 7.

THE REV. CHARLES ALFRED JENKINS, CLERK, AND THE ATTORNEY-GENERAL OF BERMUDA . . . . . } APPELLANTS.

ON APPEAL FROM THE COURT OF CHANCERY OF THE BERMUDA ISLANDS.

Islands of Bermuda—English Church—Crown Benefice, Presentation to—Inductions—Court of Chancery—Bermuda Act, 1814, *sec.* 29—*Writ, de vi laicâ removendâ.*

The issuing of the Writ, *de vi laicâ removendâ*, from the Common Law side of the Court of Chancery in *England* has fallen into desuetude, as the same relief can be given by Injunction in a case of obstruction to the induction of a party to a Benefice, to restrain all interference therewith.

The *Bermuda* Act of 1814, sec. 29, by which jurisdiction is conferred on the Court of Chancery of the Islands, with power "to examine, hear, judge, determine, and decree all matters, causes, and things whatever, as fully and amply to all intents and purposes whatsoever as the High Court of Chancery in *England* may or can do," does not necessarily confer on that Court the power to issue such a Writ.

Orders of the Court of Chancery of *Bermuda* refusing to issue a Writ, *de vi laicâ removendâ*, affirmed on appeal.

IN this case special leave to appeal from two Orders of the Court of Chancery of the *Bermuda* Islands was granted by the Judicial Committee. By these Orders an application made by the Appellant, *C. A. Jenkins*, a Clerk in Holy Orders of the United Church of *England* and *Ireland*, for a Writ, *de vi laicâ removendâ*, to be issued to the Provost-Marshal-General to remove any opposition that might be offered to his being inducted to the Parish Church of *Smith* in the Islands, under a mandate issued by the Commissary of the Bishop of *Newfoundland*, was refused, on the ground of want of jurisdiction to issue such Writ.

The proceedings which gave rise to the application were these:—

On the 9th of January, 1867, Lieut. Governor *Hamley*, the then Acting Governor of the *Bermuda* Islands, in exercise of the authority conferred upon him by the Commission and Royal Instructions, by a letter of presentation addressed to the Bishop of *Newfoundland*, or, in his absence, to the Rev. *C. P. Knight Coombe*,

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his acting Ecclesiastical Commissary within and for the Islands, presented the Appellant, *Jenkins*, for admission and institution to the then vacant Rectory of the Parish Churches of *Smith* and *Hamilton*, situate in the Islands, with the rights, members, and appurtenances thereof, and on the 17th of that month the acting Commissary of the Bishop admitted and instituted the Appellant, *Jenkins*, to the Rectory, and addressed a mandate, or letter, to the Rev. *Joseph Frazer Lightbourn*, authorizing and instructing him to induct the Appellant to the Rectory. Accordingly, on the 9th of February, 1867, the Rev. *J. F. Lightbourn* inducted the Appellant into the Parish Church of *Hamilton*, and proceeding thence to the Parish Church of *Smith* for a similar purpose, was met by a large body of laymen, who, by a display of physical force and actual violence, prevented the induction of the Appellant to that Church, from which he had ever since been excluded, the doors having been closed against him whenever he presented himself there.

On the 23rd of February, 1867, the Appellant, *Jenkins*, moved the Court of Chancery of *Bermuda* for a Writ, *de vi laicâ removendâ*, to remove any opposition by force of laity which might be offered to his being inducted to the Parish Church of *Smith*. The Appellant, the Attorney-General of *Bermuda*, appeared and was heard on behalf of the Crown in support of the motion.

The motion was refused by a majority of the Judges upon the grounds stated in their reasons transmitted to the Privy Council. Those of the Chief Justice *Darrell* being as follows:—

"My reasons for refusing it were, that the Law relating to Writs, *de vi laicâ removendâ*, is very obscure, and no instance is known of such a Writ ever having been granted in *Bermuda*. And I conceived that since the decisions of the Judicial Committee of the Privy Council in the cases of *Long* v. *The Bishop of Cape Town* in 1863 (1), and *The Bishop of Natal* in 1865 (2), it must be considered that it is not competent to the Crown in any Colony having a settled constitution and representative form of government, such as *Bermuda* has, to alter the constitution of the Church in the Colony, by conferring by Patent upon a Bishop any coercive or judicial powers not granted by the Imperial Parliament or the Local Legislature. That, although the institution of a Clergy-

(1) 1 Moore's P. C. Cases (N. S.) 411. (2) 3 Moore's P. C. Cases (N. S.) 115.

9 Jur. M. S. 805 11 Jur. M. S. 353.

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man to a Benefice is not an act of coercive or contentious jurisdiction, yet it is not a mere ministerial act, but is of a judicial nature, inasmuch as the Bishop must judge of the fitness of the Clergyman, and satisfy himself of his sufficiency in learning and morals before granting institution. That, although the Bishop of *Newfoundland's* Patent purports to invest him with large powers over the Clergy in *Bermuda*, as that Patent was issued many years ago, and before the recent discussions and decisions respecting the limited authority of Colonial Bishops under similar Patents, it cannot now be supposed, that the Bishop could lawfully exercise all the powers which his Patent purports to confer upon him; and however desirable it is for the Clergy of the Colony to be placed under the supervision of the Bishop, and with that view for him to institute and cause them to be inducted in the Parish Churches, yet it appears to me that, according to the effect of the decisions of the Judicial Committee of the Privy Council referred to, the Bishop had not lawful authority, without legislative sanction, to grant institution, and issue a mandate for induction into Benefices in *Bermuda*. And if (as I conceived), the mandate in this case was invalid, the Court ought not to grant such a Writ as was asked for, the practical effect of which would be to authorize the employment of the civil force of the Colony in aid of the mandate. I may further add, that formerly and from the very earliest period after *Bermuda* ceased to be a proprietary Colony, and after the establishment of the Royal government here, the Royal Patents or Commissions to the Governors of *Bermuda* contained a clause directing them to collate Clergymen to vacant Benefices, and the practice was for them to do so without any institution by a Bishop. This appears to have continued down to the year 1825, when a Patent from the Crown was granted to the Bishop of *Nova Scotia* purporting to give him Episcopal jurisdiction in *Bermuda*. The Commission to the next Governor of *Bermuda*, in 1831, contained a clause directing him to present Clergymen to the Bishop of *Nova Scotia* for institution to vacant Benefices in *Bermuda*. The Commission to his successor, Governor *Reid*, in 1839, contained a similar clause. The Commission to his successor, Governor *Elliot*, in 1846, contained a clause directing him to present to the Bishop of *Newfoundland*. The Commissions to his successors, Governor *Murray*, in 1854, and

Governor *Ord*, in 1861, contained no clause whatever directing either the collation, or the presentation for institution, of Clergymen to vacant Benefices, but the Royal instructions issued upon Governor *Ord's* Commission directed him to present Clergymen to the Bishop of *Newfoundland* for institution to vacant Benefices, and it was under this instruction that *Jenkins* was presented by the Lieutenant-Governor to Mr. *Coombe*. This instruction directs the presentation to be made to the Bishop. Even supposing the Bishop had authority to institute, it does not seem clear under the instruction that a presentation could properly be made during the Bishop's absence from *Bermuda* to his Commissary, or that the Commissary could admit and institute a Clergyman to a Benefice without the special direction of the Bishop in each particular case; nor, indeed, do the documents since laid before the Court distinctly shew, whether Mr. *Coombe* had ever been appointed by the Bishop as his Commissary, or was only acting in that capacity in the absence of Dr. *Tucker*, who had been Commissary. But, under the impression that the Bishop himself could not lawfully grant institution, or issue a mandate for induction into a Parish Church in *Bermuda*, it seemed to me superfluous to discuss these matters of detail as to Mr. *Coombe's* authority, and I, with five other members of the Court, refused to grant the Writ, two other Members dissenting from that decision."

On the 9th of December, 1867, a further petition was presented to the Court by *Jenkins*, and a fresh motion made for the Writ, *de vi laicâ removendâ*, to be issued to the Provost-Marshal-General for the purpose before mentioned. This petition had annexed to it copies of the Instruments of presentation, institution, and mandate for induction, and an affidavit of *Jenkins* stating the circumstances on which he relied. It did not appear that any subsequent attempt had been made for the induction of *Jenkins* since that of the 9th of February, 1867; but the affidavit stated circumstances leading *Jenkins* to believe that, if any further attempt should be made to induct him in *Smith's* Parish Church it would be obstructed by lay persons. After hearing Counsel in support of the motion, all the members of the Court, consisting of the Governor (Sir *Frederick E. Chapman*), the Chief Justice, and the Honorables *Henry J. Tucker, A. J. Musson, J. Wood, Thomas A. Darrell, Miles G. Keon,*

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and *William H. Gosling*, agreed in refusing the application. The Chief Justice's reasons for which were that, as the application was founded on the same matter on which the Court had decided in February last not to issue the Writ, and it was admitted at the Bar that some preliminary proceedings had been taken on behalf of the Crown to appeal from that decision, he conceived that the Court ought not to make an Order for issuing the Writ, the effect of which Order would be to reverse the decision that Court had made in the same case in February last.

Mr. *Thomas A. Daniel* stated his reasons as follows:—"My reason (in addition to those given by His Honor the Chief Justice) for not voting for the issue of the Writ for enforcing the mandate of His Lordship the Bishop of *Newfoundland*, in the case of the Rev. *C. A. Jenkins*, which was applied for on the 23rd of February, 1867, was chiefly, that it appeared to me, that the Court of Chancery had no authority to grant the application. This Colony was without a Bishop until the year 1825 or 1826. All inductions prior thereto were, to the best of my recollection, made by the resident Magistrates and Churchwardens. The appointment of a Bishop was followed by no change in the Law; and some years, I think, elapsed after the Bishop of *Nova Scotia* was called by Her Majesty's Letters Patent to the See of *Nova Scotia*, which at that time embraced *Bermuda*, before the intervention or substitution of the Diocesan was universally adopted for the induction of Clergymen in these Islands. My impression at the time of voting in the case referred to, was that the Church of *England* could not be considered as by Law established in this Colony, for though certain Laws had, at various times, been passed by the Local Legislature, which, it is admitted, would be essentially necessary to an establishment, such as dividing the Colony into Parishes (an Ecclesiastical arrangement)—giving the Executive the appointment of Rectors to the several livings—allotting glebe lands and parsonage-houses for the use of the Incumbents—taxing persons of all classes and denominations for the maintenance of the Rectors, &c. &c.—yet no authority has at any time been by Law conferred on the Diocesan, either as Bishop or as Ordinary, and no enactment passed by the Legislature of the Colony regulating the government and discipline necessary to a Church as an Establish-

ment. Having always understood that original Settlers do not import with them into a new Colony the Laws of the parent state in matters Ecclesiastical, and that where there is a Local Legislature it is altogether their province and their privilege to make such Laws as they may deem expedient for the government of their Church, I believed that in the absence of such legislation the Bishop was without the due authority to issue a mandate, and the Court of Chancery, therefore, without power to enforce it. It seems to me a false and most anomalous position for a Bishop to have authority to induct where there is a total absence of law giving him power to arraign, dismiss, or to punish."

Mr. *Miles Gerald Keon* differed from the other members of the Court, giving his reasons as follows:—"At a sitting of this Court on the 23rd of February, 1867, Counsel for the Rev. *C. A. Jenkins* and the Solicitor-General of *Bermuda*, moved that a Writ, *de vi laicâ removendâ*, should be granted for the purpose of protesting against the physical resistance of promiscuous assemblages near the Church to the lawfully and regularly authorized efforts (according to the Solicitor-General's argument), of the Rev. Mr. *Jenkins* to be inducted as Rector of *Smith's* Parish. Abstaining from any examination into the validity of the Ecclesiastical right claimed by *Jenkins* and denied by the Parishioners, I gave it as my opinion, that physical force, on the part of whoever were pleased to use it, was neither the proper method nor a civilized method of settling the question; that *Jenkins* was employing peaceful and constitutional means; that he had produced what appeared to be the usual documents and the regular instruments; that he relied solely upon the legality which he affirmed to be on his side; that if he was to be resisted he ought to be resisted by legal means; and that unless we wished law to give place to corporal violence—custom, reason, order, and rights to whatever popular excitement might arise—and a civilized state to tumult and anarchy—the processes adopted for resisting *Jenkins* ought to be repressed. Believing this principle to be necessary, not only to the authority of the Executive, but to the efficiency of every law in our Statute Book, I was of opinion, that the Writ should be granted in a case which appeared to me to be parallel, in the material points, with the cases adduced by the Solicitor-General. The Lieutenant-Governor, Colonel *Hamley*,

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took a similar, but in this sense a stronger view, that he supported those Ecclesiastical claims which I abstained from inquiring into. All the other Members differed from us, and the Writ was refused. At a sitting of the Court, on December the 9th, 1867, when the same Writ was again craved from us, I understood that the Attorney-General had already sent home a transcript of our former proceedings, and had taken steps to carry an appeal to the Judicial Committee of the Privy Council. Indeed, I supposed at the time, that the appeal which had been thus initiated and set in its preparatory movement, was actually under hearing, and consequently that it was an appeal against our decision of the 23rd of February, 1867. Believing the settlement of the question to be thus taken virtually out of our hands, I merely stated, that I adhered to my former views concerning the intrinsic merits of the application to our Court and of the remedy craved from us; but that it was a wrong time to reverse our action; that, for my part, I should much prefer to see it still more effectually quashed by the more authoritative award of a superior Tribunal; and that I thought it would be both more respectful to the appellate Court, and more consonant with our own dignity, to await a judgment to which we should have to bow in the end."

From this last-mentioned Order of the Court, the Attorney-General of *Bermuda,* on behalf of the Crown, applied for leave to appeal, but the time within which an appeal from the Order of the Court made on the occasion of the first application of the Appellant, *Jenkins,* could have been granted by the Court having elapsed before such leave was applied for, the Appellants presented a petition to Her Majesty in Council, praying that special leave to appeal against both Orders of the Court of Chancery in *Bermuda,* or either of them, might be granted, and the record of the proceedings in that Court transmitted to Her Majesty in Council; and upon the 24th of February, 1868, such special leave to appeal was granted.

J. C.* 1868 *Feb.* 24.

The case was heard *ex parte,* no appearance or case having been put in, further than the Judges' reasons in support of their judgment.

* *Present*:—Sir William Erle, Sir James William Colvile, Sir Edward Vaughan Williams, and Sir Robert Phillimore.

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The *Solicitor-General* (Sir *R. Baggallay*, Q.C.), and Mr. *Archibald*, for the Appellants:—

According to the constitution of the *Bermuda* Islands, appointments to vacant Benefices or Livings have ever since the establishment of the Government of the Colony, in 1685, when it was transferred to the Crown, been vested in the Crown; the right of patronage being exercised by successive Governors, who were empowered by their Commissions to collate to Churches, Chapels, or other Benefices in the Islands that might become void. This state of things continued until the year 1825, when the *Bermuda* Islands were first attached to the Colonial See of *Nova Scotia:* Royal Instructions, 26th of July, 1832, sec. 51; *Clark's* Col. Law, p. 446; Letters Patent, 17th of July, 1839, creating the Bishopric of *Newfoundland.* The Episcopal authority thus conferred upon the Bishop of *Newfoundland,* and the validity of institution and induction, have been recognised by successive Acts of the Colonial Legislature: *Bermuda* Acts, No. 1, 1843; No. 9, 1864; No. 10, 1865, sects. 39 and 43; and Nos. 9 and 19, 1866. Since the year 1825, the Governor's Commissions, or Royal Instructions, instead of authorizing them to collate to vacant Benefices, have directed them to present Clergymen to the Bishop for institution, that is, to the Bishop of *Nova Scotia,* from 1825 to 1839, and since then to the Bishop of *Newfoundland,* which See was erected in that year, and to whom was transferred the Episcopal authority of the *Bermudas.* The parochial and vestry system of the Church of *England* has prevailed from the earliest establishment of the Colony, *Bermuda* Laws, by *Darrell,* p. 158, s. 10, down to the present time: Act, No. 12, sect. 5, 1866.

It appears from the Judges' reasons that the ground upon which the Court below refused to issue the Writ, *de vi laicâ removendâ,* was, that since the decisions of this Tribunal in *Long* v. *The Bishop of Cape Town* (1), and *In re The Bishop of Natal* (2), it was not competent to the Crown, in a Colony like the *Bermuda* Islands, having a settled constitution and Legislative Assembly, to confer, by Letters Patent, on the Bishop of *Newfoundland* any coercive or judicial powers, and that, therefore, the institution of *Jenkins* being a judi-

(1) 1 Moore's P. C. Cases (N.S.) 411. (2) 3 Moore's P. C. Cases (N.S.) 115.

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cial act it was not authorized by law. The effect of these cases has been since considered in the case of *The Bishop of Natal* v. *Gladstone* (1), and the grounds of the decisions questioned, but if that were not so, those cases, by reason of the different circumstances in reference to Church establishments of the respective Colonies of the *Cape of Good Hope* and the *Bermuda* Islands, are inapplicable. Neither institution nor induction are acts of coercive or judicial institutions. Induction to a Benefice is a mere temporal act, enforceable by *Mandamus* or *Quare impedit*. The Court of Chancery in *Bermuda* has all the power and authority of the Court of Chancery in *England*: *Bermuda* Act of 22nd December, 1814, sect. 29 (2); and can, therefore, issue a Writ, *de vi laicâ removendâ*. [LORD CHELMSFORD:—A difficulty arises as to the power of the Court of Chancery in *Bermuda* to issue such a Writ. In *England* the Writ issued on the Common Law side of the Court of Chancery to the Sheriff of the County. The last-mentioned Act only gives the *Bermuda* Court jurisdiction as a Court of Equity.] So much of the Ecclesiastical Law as was recognised by the Common Law was introduced into the Colony on its occupancy by the English Settlers: *Clark's* Col. Law, p. 7; and the Court of Chancery in *Bermuda* had from the first as extensive a jurisdiction as the Court of Chancery in *England*. A form of the Writ, *de vi laicâ removendâ*, is given in *Fitzherbert, Natura Brevium*, D. 54, and was acted upon in *Rex* v. *March* (3); *Rex* v. *Zakar* (4); *Roberts* v. *Agmondesham* (5); *Bird* v. *Smith* (6); see also *Comyn's* Dig. tit. "*Esglise*" (N. 12); *Burn's* Ecc. Law, tit. "Benefice," vol. i.

(1) Law Rep. 3 Eq. 1.

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(2) This section enacts, "that the Governor or Commander-in-Chief of these Islands, and His Majesty's Council, for the time being, (or any five of them, of whom such Governor or Commander-in-Chief shall always be one) shall constitute the Court of Chancery for these Islands, and have power and authority to examine, hear, judge, determine, and decree, all matters causes and things whatever, as fully and amply, to all intents and purposes whatsoever, as the High Court of Chancery in *England* may or can do, and have power to make and establish such rules, regulations, and Orders respecting the practice merely, of the said Court, as may be necessary or expedient: provided that such rules and regulations be not repugnant to this Act, and, as nearly as conveniently may be, be agreeable to the rules of practice established in the High Court of Chancery at *Westminster Hall* in *England*." *Bermuda* Acts, by *Darrell*, p. 117.

(3) Siderf. 101.

(4) Bulst. Pt. iii. 92.

(5) Moore's Rep. 462.

(6) Ibid. 781.

p. 173; *Ib.* tit. "*Vi Laicâ removendâ*," vol. iv. p. 11 [9th Edit., by *Phillimore*]; *Watson's* Clergyman's Law, p. 307; *Mirehouse* on Advowsons, ch. x. p. 134. It is clear from these authorities that the application ought to have been granted, and the Writ issued. J. C. 1868 *Ex parte* JENKINS.

The consideration of the case having been reserved, their Lordships' judgment was now pronounced by 1868 *Dec.* 23.

LORD CHELMSFORD:—

This is an appeal from two Orders of the Court of Chancery of the Islands of *Bermuda*, upon an application on behalf of the Rev. *Charles Alfred Jenkins* for a Writ, *de vi laicâ removendâ*, to remove any opposition which might be offered to his being inducted into *Smith's* Parish Church as the Rector and Incumbent thereof.

A majority of the Court refused the Writ for the reasons assigned by the Chief Justice, one of the Members of the Court. He said, that the law relating to Writs, *de vi laicâ removendâ*, was very obscure, and that no instance was known of such a Writ ever having been granted in *Bermuda*. And he conceived that since the decisions of the Judicial Committee of the Privy Council in the cases of *Long* v. *The Bishop of Cape Town* (1), and *In re The Bishop of Natal* (2), it must be considered that it is not competent to the Crown in any Colony having a settled constitution and representative form of government such as *Bermuda* had, to alter the constitution of the Church in the Colony, by conferring by Patent upon a Bishop any coercive or judicial powers not granted by the Imperial Parliament or the Local Legislature. That it appeared to him, that according to the effect of these decisions the Bishop had not lawful authority, without Legislative sanction, to grant institution and issue a mandate for induction into Benefices in *Bermuda*.

The appeal was argued *ex parte*, no one appearing on the other side, although ample notice was given to a person who had been the foremost in resisting the induction of Mr. *Jenkins*, that leave to appeal had been granted.

Under these circumstances, their Lordships before delivering their judgment have very carefully considered the grounds which were assigned for refusing to grant the Writ prayed for, and the

(1) 1 Moore's P. C. Cases (N.S.) 411. (2) 3 Moore's P.C. Cases (N.S.) 115.

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arguments which were urged by the Appellants against such refusal.

The Islands of *Bermuda*, which had previously been a Proprietary Colony, were transferred to the Crown in 1685. They then possessed, and have ever since enjoyed, an independent Legislature. They were first attached to the Colonial See of *Nova Scotia* in the year 1825, and were afterwards transferred, in 1839, to the newly-erected Bishopric of *Newfoundland*.

By the Letters Patent of Dr. *Inglis*, who was appointed Bishop of *Nova Scotia* and its dependencies in 1825, authority was given to him to exercise jurisdiction, Spiritual and Ecclesiastical, and all and singular the functions and authorities within (amongst other places) *Newfoundland* and the *Bermudas*, which might be lawfully exercised within the Province and Diocese of *Nova Scotia*.

By the Letters Patent of 1839, erecting the Island of *Newfoundland* into a Bishop's See, the former Letters Patent were revoked so far as they related to the Islands of *Newfoundland* and the *Bermudas*; and power and authority were given to the Bishop, by himself or by his sufficient Commissary or Commissaries to be by him substituted and appointed, to exercise jurisdiction, Spiritual and Ecclesiastical, and all and singular functions and authorities within the Islands of the *Bermudas* and their dependencies, which might, by virtue of the Letters Patent, be lawfully exercised by himself or his Commissary or Commissaries within the Island and Diocese of *Newfoundland*.

The Islands of *Bermuda* seem to have been divided into Parishes at the time of their becoming a Crown Colony, or very soon afterwards, for amongst the Acts of their Legislature, there is one, as early as the year 1693, for settling a yearly revenue upon the Minister or Incumbent of *St George's* Parish, and of the other Parishes within the Islands. That the parochial system was completely established towards the end of the last century appears from another Act of the 30th of March, 1775, intituled "An Act for the more regular payment of the Clergy; the regulating the Seats or Pews in the several Churches in these Islands; and more effectual recovery of Parish Assessments." And the Church of *Smith* itself, to which these proceedings apply, has been the subject of Legislative provision: for, by an Act of the 17th of March,

1820, it is enacted "that the Parishes of *Smith* and *Hamilton*, together with the annual interests, profits, or issues payable by law for the glebe situate in the Parish of *Hamilton*, and which has been sold in fee simple, conditional, under and by virtue of an Act of the Legislature, shall constitute one living."

It must be borne in mind that, during the whole of this long period, when the Legislature of the *Bermudas* was constantly recognising the establishment of Parishes and their Incumbents, the power of appointing Clergymen to the different Parishes was vested in the Governors. This authority they possessed by delegation from the Crown, conveyed to them by a clause in their Commissions, directing them to collate to all vacant benefices within the Islands. This form of Commission continued down to the year 1831, when it was changed by substituting a clause directing the Governor, upon the vacancy of a Benefice, to present a Clerk to the Bishop (first of *Nova Scotia* and afterwards of *Newfoundland*) for institution.

This clause continued to be inserted in the Governor's Commission down to the year 1861. Since that time it has been omitted from the Commissions and introduced into the Instructions to the Governors.

In explaining the reasons for refusing the Writ, *de vi laicâ removendâ*, the Chief Justice, after stating that it was not competent to the Crown to alter the constitution of the Church in the Colony by conferring by Patent upon a Bishop any coercive or judicial powers not granted by the Imperial Parliament or the Local Legislature, added, "Although the institution of a Clergyman to a Benefice is not an act of coercive or contentious jurisdiction, yet it is not a mere ministerial act, but is of a judicial nature."

Strictly speaking, however, it is not so much the institution which is judicial, as the previous examination of the fitness of the Clerk presented; for if the Clerk be really *idonea persona*, the Bishop would be bound to institute him. But whether institution is to be regarded as a judicial or a ministerial act is wholly immaterial.

The question is, whether the Crown has conferred an authority which was not within its competency.

Now, it is a fact, which cannot be disputed, that for more than a century the Crown possessed the power of collating to all the vacant Benefices in the *Bermudas* by direct nomination, a power

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which it exercised by delegation to the successive Governors, who were usually described as Ordinaries in their Patents, and who, to a certain extent, exercised the powers of that Ecclesiastical Officer. But when a Bishop or Ecclesiastical Ordinary was duly appointed, with spiritual oversight of the Church in the *Bermudas*, the Crown, as patron, thought proper to leave to the Governor the power of nominating the Clerk, but recognised, by the Letters Patent granted to the Bishop, the power of institution belonging to his office. The Bishop, as has been said, is bound, if the Clerk be *idonea persona*, to institute him.

It cannot be supposed that when the Crown gave a Clergyman a title to a living by one act of collation, the appointment was made without previous inquiry as to his qualifications. The whole effect of the alteration of the system of conferring Benefices in the *Bermudas* is to transfer this inquiry from the Governor to the Bishop.

It seems to have been supposed, however, that the cases of *Long* v. *The Bishop of Capetown* and of *In re The Lord Bishop of Natal* are authorities for the proposition that the Bishop of *Newfoundland* has no legal *status*, and cannot lawfully exercise any episcopal function within the *Bermudas*. The first case certainly does not go the length of that proposition, for it decided only that the Crown cannot confer coercive authority on a Bishop in a Colony possessing a constitutional form of government without the consent of the Legislature. The Judicial Committee, in deciding the case of the *Bishop of Natal*, has certainly used expressions which would restrain the power of the Crown in the creation of Bishops within even narrower limits.

It has been argued that the Master of the Rolls, in his judgment in *The Bishop of Natal* v. *Gladstone* (1), has greatly qualified the effect of the former judgment of the Privy Council. Their Lordships think that in the present case they are not called upon to express an opinion, whether these two decisions can be reconciled. For they are clearly of opinion that the question, whether the Bishop of *Newfoundland* has any lawful *status*, or can exercise any Episcopal function, and particularly that of institution in the *Bermudas*, has been set at rest conclusively by the repeated recognition of his *status* and functions by the Colonial Legislature. The Acts of 1843, of 1864, of 1865, and 1866, mentioned in the Memo-

(1) Law Rep. 3 Eq. 1.

randum of the Attorney-General of the *Bermudas* (1), all recognise the legal *status* of the Bishop of the Diocese.

The Chief Justice doubted whether the institution of *Jenkins* to the Church of *Smith* was valid. Upon this point he said, supposing the Bishop had authority to institute, it did not seem clear, under the instructions of the Governor, that a presentation could properly be made during the Bishop's absence from *Bermuda* to his Commissary, or that the Commissary could admit and institute a Clergyman to a Benefice without the special direction of the Bishop in each particular case. Now, as already shewn, the Bishop of *Newfoundland* has authority by his Letters Patent to exercise all his functions and authorities by himself or his Commissary. And that a general authority may be given to the Commissary, and that a special direction upon each occasion is unnecessary, appears from a clause in the Letters Patent, "that during the vacancy of the See by the demise of the Bishop or his successors, or otherwise, institutions to Benefices and licenses to Curates may be given by the Commissary or Commissaries who were so as aforesaid named and substituted by the last preceding Bishop, and were in possession of that office under such substitution and appointment at the time when the See became vacant."

Mr. *Jenkins* was duly presented by the Governor to the Rectory of the Parishes of *Hamilton* and *Smith* by a formal presentation to the Bishop, or, in his absence, to Mr. *Coombe*, his Acting Ecclesiastical Commissary. And Mr. *Coombe*, reciting his authority derived from the Bishop as Commissary, and that he was acting by virtue of it, instituted Mr. *Jenkins* to the Rectory and issued a mandate for his induction, upon which he was quietly inducted into the Church of *Hamilton;* but resistance was made to his being put into possession of the Church of *Smith*.

(1) The document here alluded to, and which was lodged with the appeal, was a "Memorandum on the history and *status* of the Bishops and Clergy of the Church of *England* in *Bermuda*, furnished in obedience to an Order of His Excellency Governor *Ord*, C.B., conveyed by the Attorney-General through the Hon. *Miles G. Keon*, Colonial Secretary of *Bermuda*, in reply to a Circular Despatch from the Secretary of State for the Colonies of the 13th of September, 1866." It contained a succinct account of the original establishment of the English Church in the *Bermudas*, and its annexation to the See of *Newfoundland*, with extracts from the Colonial Charters and Statutes relating to the establishment of Churches and the Ecclesiastical jurisdiction in the Islands.

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There can be no doubt that Mr. *Jenkins* was duly presented to the Rectory, and was instituted by lawful authority.

The only remaining question is, as to the remedy which Mr. *Jenkins* sought to obtain for the obstruction offered to his induction into the Church of *Smith*.

The Writ, *de vi laicâ removendâ*, may be regarded at the present day as an obsolete proceeding. Very little is to be found in the Books as to the nature of the procedure upon this Writ. The short account which is given of it in *Fitz., Nat. Brev.*, D. 54, furnishes very slight information. There is no doubt that the Writ issued out of the Court of Chancery (as, indeed, all original Writs formerly did), and of course from the Common Law side of that Court. It also was applicable only to the case of an Incumbent of the Established Church who was hindered or disturbed in his possession of the Church.

It is very difficult to see how this remedy could be applied by the Court of Chancery in the *Bermudas* to the case of the disturbance of a Church in those Islands.

A Court of Chancery was established by an Act of the Legislature of the Islands in the year 1814. By section 29 of this Act, after enacting the mode in which the Court is to be constituted, power and authority is given to it "to examine, hear, judge, determine and decree, all matters, causes, and things whatever, as fully and amply, to all intents and purposes whatsoever, as the High Court of Chancery in *England* may and can do" (1), and also to make and establish such rules, regulations, and Orders respecting the practice merely of the said Court as may be necessary or expedient.

The words of the Act are very large, and confer jurisdiction in very full terms, but it may be questioned, whether they are intended to apply to the case of ordering a specific form of proceeding to be applied to a particular cause of action. It may be said, that they give power to judge and determine whether the facts were such as to call for a Writ, *de vi laicâ removendâ;* but that would be to beg the preliminary question, whether such a Writ is issuable. It is probable that, under the power subsequently given to make rules and Orders respecting the practice of the Court, this form of remedy might be introduced, as the forms of Writs and remedies are matters of practice of a Court.

(1) See section 29, *ante*, p. 266.

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No rule has been made by the Court of Chancery in the *Bermudas* with regard to this Writ *de vi laicâ removendâ;* and there is great doubt whether the Court would be disposed to make any rule or order on the subject. The forms of procedure in the English Courts may or may not be appropriate in a Colony, or capable of being properly addressed and put in use. This Writ is not an essential mode of preserving and quieting possession, and all that was practically wanted in the present case was to put a Minister in possession and enjoyment of his temporalities. It is not, therefore, *ex debito justitiæ,* that the Appellants should have this particular form of remedy. It is not *universi juris* wherever an Established Church exists; for it can issue only out of a Court of Chancery, and there may be no Court of Chancery in this sense, viz., with full authority to frame and issue the Writ. The authority in this case, therefore, if it exist at all, must be implied, for it has never been used before. But why should it be implied? Is it a necessary incident of Chancery jurisdiction? If not, it is not conferred by the words creating the Court of Chancery in the *Bermudas*—words which (as already observed) apply to jurisdiction over matters in dispute, and not to modes of procedure. And an injunction would, probably, have served all the necessary requirements in the present case, and have restrained all interference with the induction of Mr. *Jenkins.* It seems to their Lordships, that it would be an inconvenient precedent to imply the existence of a Writ not known to the Court itself, nor necessary to the enforcement of the legal right obstructed, merely from the creation of a Court, and a general grant in large words of general jurisdiction.

Their Lordships entertain no doubt whatever of the lawfulness of Mr. *Jenkins'* institution to the Rectory of *Hamilton* and *Smith,* and of his right to be inducted into the Church of *Smith.* But they cannot say, that the Court of Chancery was wrong in refusing to grant him the Writ, *de vi laicâ removendâ,* to prevent the obstruction to his induction, and, therefore, upon this ground, and this ground only, they must humbly recommend to Her Majesty that the appeal be dismissed.

The Solicitors to the Treasury for the Appellants.

J. C.*
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Feb. 2.

Ex parte KISTO NAUTH ROY.

IN THE MATTER OF

MUSSUMAT RANEE SURNO MOYEE . . APPELLANT;

AND

SHOSHEE MOKHEE BURMONIA, AND OTHERS, RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT CALCUTTA.

Practice—Appeal heard ex parte—Rehearing—Entry of appeal—Default of Respondent's Agent.

The rehearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal reheard.

A rehearing will not be allowed except under very special circumstances.

THIS was an application by the Petitioner, *Kisto Nauth Roy*, in the case of "*Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia, and others*," for the rehearing of the appeal, which had been heard *ex parte* at the instance of the Appellant, and an Order in Council reversing the decision of the Court below made thereon, no appearance having been entered for him (1).

The petition alleged, that on the 19th of August, 1864, the Petitioner obtained a decree in his favour in the High Court at *Calcutta* in a suit brought by the Appellant, *Mussumat Ranee Surno Moyee*, against the Petitioner and others, and that from that decree the *Ranee* appealed to *England;* that in the month of September, 1867, the Petitioner instructed his Agents in *England* to appear for him in the appeal, and take all necessary steps on his behalf, with a view of maintaining the decree of the High Court; that on the 23rd of October, 1867, the Petitioner's Agents attended the Privy Council Office, and made inquiries with respect to the appeal, and were informed that the Record of the appeal had not yet arrived in this

(1) The appeal of *Mussumat Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia, Kisto Nauth Roy*, and others, was heard by the Judicial Committee on the 17th of December, 1868. The question involved related to the operation of the *Limitation of Suits Act*, of the Indian Legislature, No. XIV. of 1859.

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR JOSEPH NAPIER, and SIR LAWRENCE PEEL.

country; that the Agents on the same day wrote a Letter to the Registrar of the Privy Council, headed "*Ranee Surno Moyee*, Appellant; and *Kisto Nauth Roy*, Respondent," asking him to give them notice when the transcript arrived, and to enter an appearance in their names for the Petitioner; that the appeal was, notwithstanding many inquiries by his Agents, and every diligence on the part of the Petitioner, set down for hearing, and ultimately heard *ex parte* in the absence of the Petitioner, and judgment given on behalf of the Appellant; that the Petitioner had ascertained that in the certificate of the Registrar of the Indian Court accompanying the transmission of the Record to *England* the title of the appeal was given "*Mussumat Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia*," without adding the words "and others," and that in consequence of this omission and mistake the appeal was entitled in the same manner in the record of the Privy Council Office, and that the Appellant having many other appeals pending before the Privy Council, the Officers of the Privy Council were misled by such title, and unable to give your Petitioner information of the steps taken in the appeal; that there were other parties Defendants in the suit, but that the Petitioner and *Shoshee Mokhee Burmonia* alone appealed from the decree of the High Court, and that in the proceedings in the Court below the Petitioner's name was sometimes used first, and sometimes the name of *Shoshee Mokhee Burmonia;* and the Petitioner stated, that he had used every diligence to have the appeal argued on his behalf before the Privy Council, and submitted that a rehearing of the appeal so heard *ex parte* ought, under such circumstances, to be allowed, and prayed that he might be at liberty to appear to and argue such appeal.

Mr. *Manisty*, Q.C., and Mr. *Doyne*, for the Petitioner:—

There was a *bonâ fide* intention on the part of the Petitioner to appear and support the decree made in his favour by the High Court. He had retained Counsel, who were to be instructed at the hearing of the appeal. No default can be imputed to his Agents in *England* for not entering an appearance, and the hearing took place under circumstances over which he had no control. The Petitioner's Agents were misled by the name of the Petitioner being omitted in the title of the appeal transmitted from *India*,

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the fact being, that there were other appeals then pending by the same Appellant in which the Petitioner was not a party. A rehearing of an appeal heard *ex parte* in similar circumstances was granted in *Rajundernarain Rae* v. *Bijai Govind Sing* (1); *Dumaresq* v. *Le Hardy* (2). There the law and practice in such circumstances were investigated, and are fully stated both in the argument and judgment, and in the notes appended by the Editor to the report.

Mr. *Cave*, for *Mussumat Ranee Surno Moyee*, opposed:—

Nothing is shewn to entitle the Petitioner to the extraordinary relief now asked for, and there does not appear to have been a *bonâ fide* intention to enter an appearance, no step being taken until the Order in Council was made reversing the decree of the Court below. In such circumstances, the Court will adopt the rule laid down in *The Singapore* and *The Hebe* (3); *The Montreal Assurance Company* v. *McGillivray* (4); *Motz* v. *Moreau* (5); and refuse the application.

1869 *Feb.* 6.

Judgment was reserved, and now delivered by

Lord Chelmsford:—

This is a petition for the rehearing of an appeal from a decree of the High Court of Judicature at *Fort William* in *Bengal*, which was heard *ex parte* on the appearance of the Appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the appeal should be allowed, and the decree of the Court below be reversed.

The Petitioner, one of the Respondents in the appeal, prays for a rehearing on the grounds, that he had fully intended to appear in support of the decree, and had given instructions to his Agents in *England* to enter an appearance for him, and take all necessary steps for maintaining the decree, but that neither he nor his Agents had any notice that the appeal had been entered, nor were they aware of its having been fixed for hearing until after the hearing had taken place, and the report made to Her Majesty in Council had been agreed to.

(1) 1 Moore's P. C. Cases, 117.
(2) Ibid. 127.
(3) Law Rep. 1 P. C. 378.
(4) 13 Moore's P. C. Cases, 125.
(5) 13 Moore's P. C. Cases, 376.

In support of the petition the case of *Rajundernarain Rae* v. *Bijai Govind Sing* (1) was relied upon to shew that it is competent to their Lordships, even after a report to the King and the confirmation of the report, to recommend that there shall be a rehearing.

Such an unusual indulgence, however, ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a rehearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the Respondent alone, and the Committee, adopting a form of Order which had been used on previous occasions, affirmed the decree of the Court below, and dismissed the appeal with costs upon a petition by the Appellants praying to have the Order for dismissing the appeal and affirmance of the judgment recalled, and for leave to prosecute their original petition of appeal. Their Lordships considered that a simple dismissal was to be regarded as the Order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed. And upon the application for a rehearing, Lord *Brougham*, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in *Calcutta*, and appeared by a public functionary through the appointment of that Court as their Guardian *ad litem ;* this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with funds in his hands which had been allowed for the expense of the suit, and he was not to be found when the Agent here desired to communicate with him, nor had he since returned. Their Lordships, therefore, thought "in the particular circumstances of the case," His Majesty should be advised to amend the Order, and to let in the Appellants to be heard, notwithstanding the dismissal, that is to say, "to restore the appeal," but the conditions were imposed of payment of the Respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a rehearing.

(1) 1 Moore's P. C. Cases, 117.

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In the present case it cannot be truly alleged that the *ex parte* hearing took place without any default on the part of the Petitioner or his Agents.

The appeal was from a decision of the High Court of Judicature at *Fort William* in *Bengal*, in favour of the Defendants, in a suit in which *Mussumat Ranee Surno Moyee* was Plaintiff, and *Shoshee Mokhee Burmonia*, the Petitioner, *Kisto Nauth Roy*, and several others, were Defendants.

In the certificate of the Registrar of the Court accompanying the transmission of the Record, the only Defendant named in the title of the appeal was *Shoshee Mokhee Burmonia*, without the addition of the words "and others:" but in the Record itself the words "and others" were added to the name of the Defendant. The Petitioner's instructions to his Agents probably named only himself as the Respondent in the appeal, because a Letter, dated the 23rd of October, 1867, was written by them to the Registrar of the Privy Council in these words—

"*Ranee Shurno Moyee*, Appellant,
and
Kisto Nauth Roy, Respondent,
In appeal from *Bengal*.

"We are instructed on behalf of the Respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this country, and by your entering an appearance in due time in our names on behalf of the Respondent."

The Agents made inquiries at the Council Office on the day this letter was written, and also subsequently in the same month of October, whether the Record in the appeal had arrived. As there was no appeal with the title named in the Letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this Country was owing to the inaccurate description of the appeal given by the Petitioner to his Agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other Respondents besides himself, and that his name did not stand the first amongst the Defendants in the title of the suit. All the ignorance of the proceedings taken on

the part of the Appellant resulted from the Petitioner having thus originally misled his Agents in his instructions to them. The Agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do, but they should have examined for themselves at the Council Office, and, having the name of the Appellant accurately given, they would have ascertained that there was an appeal by him, and upon the production of the proceedings they would have found that to the name of the Respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the appeal in which the Petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a rehearing to the Petitioner would be to give him the benefit of his own and his Agents' default.

It is necessary to distinguish this case from that of *Macleary* v *Hill* and others, which was heard by this Committee on the 30th of June, 1868, and in which their Lordships intimated their opinion, that the decree appealed from ought to be varied and amended, and directed minutes of the proposed report to be prepared by the Counsel for the Appellant. This was accordingly done, and on the 2nd of July the minutes were approved and adopted by their Lordships, and were afterwards, on the 7th of July, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final Order, discovered that the Appellant's Solicitor had omitted to take out and issue the usual process requiring four out of the five Respondents to appear to the appeal, although he had issued the regular process against the fifth Respondent. The Registrar reported this fact to their Lordships, and on the 10th of July their Lordships reported to Her Majesty that the Order of the 7th of July ought to be revoked. The appeal then stood over for further directions, and the Appellant was ordered to serve a personal notice of the appeal on each of the four Respondents who had not appeared.

The distinction between this case and the present is, that in *Macleary* v. *Hill* and others, the Appellant had neglected to take an essential step in the appeal, and was, therefore, not entitled to

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set down the case *ex parte* as against the Respondents. In the present case, although no appearance had been entered on behalf of the Respondents or either of them, the Appellant had done all he was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the Petitioner, who now asks for a rehearing of the appeal. The petition must be dismissed with costs.

Solicitors for the Petitioners: *Bischoff, Coxe, & Bompas.*
Solicitors for the Opponent: *Judge & Watkins.*

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RICHARD DINES . . . . . Appellant;

AND

JAMES EPHRAIM WOLFE . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Agreement for race according to rules of Australian Jockey Club, construction of —Stakes, action for, against Stakeholder—New Trial.

59 043.

In an action for the recovery of the amount of the stake deposited by one of the parties to a Horse race, to abide the event of the race, the jury found for the Plaintiff on the ground that the race, though run under the auspices of the *Australian Jockey Club*, was not run under the Jockey Club rules as provided by the agreement; the Court below granted a New Trial on the ground that the race was properly run under the agreement:—

Held, by the Judicial Committee, on the construction of the agreement and the rules of the Jockey Club which it referred to, that the finding of the jury was wrong, and that a New Trial was properly granted.

THIS was an action brought in the Supreme Court of *New South Wales* by the Appellant against the Respondent.

The declaration was for money received by the Respondent to the use of the Appellant, and the particulars of demand were, "To amount of stakes deposited in the Defendant's hands to abide match between *Kyogle* and *Traveller* (two race-horses), and won by *Traveller*, £1,000."

* *Present*:—Lord Chelmsford, Sir James William Colvile, and Sir Joseph Napier.

The Respondent's only plea to the declaration was, never indebted; on which plea issue was joined.

It appeared at the trial, which lasted several days, and was heard by Mr. Justice *Milford*, that the claim was for money alleged to be due to the Appellant from the Respondent as holder of certain stakes deposited with him by the parties under the following agreement:—

"Memorandum of agreement, made this 20th day of October, 1862, between *Richard Dines*, Esq., of *Singleton*, Owner of *Kyogle*, and *T. M. Doyle*, Esq., Owner or namer of *Traveller*. Witnesseth, that Mr. *Dines* agrees to run a match with *Kyogle*, with Mr. *Doyle's Traveller*, under the following terms and conditions, viz.:—That the match shall be for the sum of £500 a-side, to be run over *Randwick* Racecourse fourteen days before the *Randwick* Autumn Meeting, 1863. Distance, three miles; one event; weight for age. The match to be run under the *Australian Jockey Club* rules. The match to be run under the auspices of the *Australian Jockey Club* That a deposit of £100 sterling a-side is now placed in the hands of Mr. *James E. Wolfe*, hereby appointed Stakeholder, to bind the match, and that the remainder of the money shall be deposited in the hands of the Stakeholder fourteen days previous to the race; and in the event of either party failing to comply with the above conditions, the sum now deposited shall be forfeited to the party fulfilling the terms of agreement.

That the final deposit shall be made on the aforenamed time, before eight o'clock p.m., at Mr. *James Fulford's, Northumberland Hotel, West Maitland.*

Richard Dines.

Witness, *Thos. Miers.* *F. M. Doyle.*

James E. Wolfe. Received the above £200."

Both parties were Members of the *Australian Jockey Club*, the Rules and Regulations of which were put in evidence.

At the trial, evidence was given on the part of the Appellant to shew, that the Horse *Traveller* was a five-year-old Horse, and that, under the regulations of the *Australian Jockey Club*, and by the table of standard weights attached thereto, when running with the Horse *Kyogle*, did not carry the weight allotted to a five-year-old Horse.

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On the part of the Respondent evidence was given to shew, that a race was run on the 16th of April, 1863, according to the terms of the above memorandum of agreement; that the Appellant objected to the deposit being lodged with the Treasurer of the *Australian Jockey Club*, and that it was not until the day after such race had been run that the Appellant made the objection disclosed in the following letter:—

"*Sydney*, April 16th, 1863.

"Gentlemen,—*Traveller* having started in this match as a four-year-old, I protest against him being declared a winner. I can produce Certificates to prove him five years old.

I am, Gentlemen,
Your obedient Servant,
Rd. Dines.

Stewards of the *Australian Jockey Club.*
I enclose £5. 0*s.* 0*d.*"

It appeared that on the following day the Stewards of the Jockey Club held an inquiry in the manner prescribed by their rules; that such meeting was several times adjourned for the production of further evidence on both sides; that the Appellant had asked for a further adjournment, which was refused; and that on the 23rd of April, 1863, the Stewards made the following Award:—

"The Stewards of the *Australian Jockey Club*, after a full investigation of the case, having duly considered the evidence adduced by both parties (and regard being had to the Certificate unanimously and unhesitatingly concurred in by three well qualified and experienced Veterinary Surgeons who examined *Traveller's* mouth), see no reason to dissent from the decision given by the Stewards on a similar appeal in September last, and now decide accordingly —That *Traveller* was correctly described as a four-year-old horse on the occasion in question. They, therefore, declare *Traveller* to be the winner of the match."

Acting under threat of legal proceedings by *Doyle*, the Owner of the Horse *Traveller*, the Respondent paid over the stakes to him.

After the evidence on both sides had been given, Mr. Justice *Milford* summed up the case, and left, in effect, the following questions to the jury: First, whether the agreement in question

was fraudulently entered into by the Appellant? Secondly, whether the Appellant had withdrawn from the agreement which he had made to submit to the arbitration of the Stewards? and, thirdly, whether there had been a fair and honest decision of the Stewards against the Appellant? The jury returned the following special finding: First, we are of opinion, that there was no fraud in the agreement. Secondly, we think the Plaintiff entitled to a verdict of £500, inasmuch as the Stewards of the *Australian Jockey Club* supervised the starting of the Horses. Thirdly, we are of opinion that the Stewards of the *Australian Jockey Club* did not give a full and fair investigation of the circumstances of the case; and the jury found a verdict for the Plaintiff for the sum of £500.

The Respondent afterwards moved for a new trial, and obtained a rule *nisi*, which, on the 7th of March, 1864, was made absolute, and the verdict set aside, and a new trial ordered.

The reasons given by the Court for granting a new trial were as follows:—

"We were of opinion, that the race in controversy was clearly run under the rules of the Jockey Club, of which fact, the starting of the Horses by the Stewards, the provision in the agreement that it should be so run, and the utter absence of any other agreement between the parties, as well as the Plaintiff's protest and reference to the Stewards after the race, notwithstanding his previous conduct and observations, afford (we think) abundant proof. But, it having been contracted that the race should be so run, and the race really having been so run, the Plaintiff was bound in all respects by those rules, and having agreed—as both parties must be taken to have done—that any dispute arising between them, as to that race, should be decided finally by the Stewards of the Club, he cannot be permitted to complain in a Court of law that their decision, if itself an honest one, has been mistaken. Such we take to be the effect of all the cases on this subject. The following were cited on the argument, and have been considered by us: *Benbow* v. *Jones* (1); *Brown* v. *Overbury* (2); *Ellis* v. *Hopper* (3); *Parr* v. *Winteringham* (4); and *Carr* v. *Martinson* (5). With regard to

(1) 14 M. & W. 193.
(2) 11 Ex. 715.
(3) 4 Jur. (N.S.) 1025.
(4) 28 L. J. (Q.B.) 123.
(5) 28 L. J. (Q.B.) 126.

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the fairness of the inquiry, doubtless if it had been dishonestly conducted, or the decision itself the result of any improper and discreditable motive, a very different issue would be presented. But we believe it to have been conceded that no such conduct or motive was imputed to the Stewards. Nor was it contended, as we understood, that the finding of the jury amounted to, or was meant to convey, any such imputation. It simply expresses the opinion, that the investigation was unfair in this sense only, that, under the circumstances, it was not a full one. If more was intended, it should have been expressed, but for this alone a new trial would be necessary. The answer to this objection of insufficiency in the inquiry (in other words, to the complaint that more time was not afforded for additional testimony) is this, that the Stewards had the discretion vested in them to determine whether the evidence which had been already adduced, in connection with the examinations then and on a previous occasion directed, was or not sufficient. The rule, in short, is, in cases of this kind, that no mere errors of judgment in the decision, or in the conducting of the inquiry, will defeat the Award of the Referees if they have in fact meant to do right. We may add, as we believe that in delivering our oral judgment we did, that we do not see how the Plaintiff can retain his verdict, even if the race was not run under the rules of the Club. For if not, under what other footing, or what agreement other than the written one, was it run? And since the Plaintiff did not withdraw his Horse, nor at any time demand back his stake, as on a rescinded agreement, but concurred in the running of the race in which his Horse was confessedly beaten, there would be nothing (so far as we can discover) to disentitle his adversary to both stakes, on the assumption that the race was not subject to the Club rules whatever may have been the Horse's age."

The appeal was from this Order making the rule absolute.

Mr. *Charles E. Pollock*, Q.C., Mr. *Darvall*, and Mr. *C. Bowen*, for the Appellant:—

The special finding of the jury was right, and there was no valid reason for the Court ordering a New Trial. The race was run under those rules only of the *Australian Jockey Club* which related to weights and ages, and not under the rules which related to the

powers of the Stewards. The Stewards had no jurisdiction or authority to pronounce any decision as to the age of *Traveller*, or the weights he ought to have carried. The question as to the age of *Traveller* was one for a jury to decide, and the jury did, in effect, decide that the *Traveller* was, at the time of the race, a five-year-old Horse. This case is distinguishable from *Marryatt* v. *Broderick* (1); there the race was run under certain rules, one being that disputes were to be settled by the Stewards, and it was held that a party could not recover after the race was won, or, at all events, unless he claimed the stakes before the race. Here there was no submission to abide by the Award of the Stewards. In that case Baron *Parke* says (2):—"If the Stewards have become incompetent to decide the question, it must be decided by the Tribunal to which all matters of fact are legally referable, namely, a jury. Even if the Plaintiff had given notice in due time that he should require his stake returned, this being a legal Horse race, I have great doubts whether it would be recoverable." It was considered in the Court below, on the authority of this case, that the protest ought to have been before the race was run, and, therefore, we were barred, but Lord *Campbell*, in *Parr* v. *Wintering-ham* (3), decided, that although the Judge of a Horse race has power to decide finally who is entitled to take the stakes as winner, such power does not accrue to him until the race has been run. Another objection is, that the Stewards refused to receive material evidence tendered by the Appellant, and their Award was, therefore, invalid. The evidence establishes the fact that the race was run without the consent of both parties, the Appellant, therefore, was entitled to recover the £500 staked, the agreement between him and *Doyle* being, in effect, rescinded.

The *Solicitor-General* (Sir *John D. Coleridge*, Q.C.), and Mr. *T. Salter*, for the Respondent, were not called on.

Their Lordships' judgment was delivered by

LORD CHELMSFORD :—

Their Lordships do not think it necessary to hear the learned Counsel for the Respondent in this case.

(1) 2 M & W. 369. (2) 2 M. & W. 372. (3) 28 L. J. (Q.B.) 126.

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This is an appeal from the judgment of the Supreme Court of *New South Wales* granting a New Trial; and the only question to be decided is, whether the verdict is satisfactory, and ought to be permitted to stand. The jury, by their verdict, found that the Plaintiff was entitled to a sum of £500, being the amount of his stakes deposited to abide the event of a race, inasmuch as the Stewards of the *Australian Jockey Club* supervised the starting of the Horses; in other words, that the Plaintiff was entitled to his own stakes back again, because the race was run under the auspices of the Jockey Club.

Now, if the race was actually run, it is quite clear that the Plaintiff cannot be entitled to recover back his stakes. The Plaintiff, however, says that the race was the subject of an agreement, and that the race was not run according to that agreement. The agreement is in these terms:—"Mr. *Dines* agrees to run a match with *Kyogle* and Mr. *Doyle's Traveller*, under the following terms and conditions, viz. that the match shall be for £500 a-side, to be run over the *Randwick* Racecourse, fourteen days before the *Randwick* Autumn Meeting, 1863. Distance, three miles; one event; weight for age. The match to be run under the *Australian Jockey Club* rules. The match to be run under the auspices of the *Australian Jockey Club.* That a deposit of £100 sterling a-side is now placed in the hands of Mr. *James E. Wolfe,* hereby appointed Stakeholder, to bind the match, and that the remainder of the money shall be deposited in the hands of the Stakeholder fourteen days previous to the race; and in the event of either party failing to comply with the above conditions, the sum now deposited shall be forfeited to the party fulfilling the terms of the agreement." Then there is a stipulation as to the final deposit.

The Plaintiff gave evidence on the trial, that "When the Jockeys went to the scales, after the race, and *Traveller's* Jockey was being weighed, I asked the weight, 8st. 9lbs.,—that is the weight for four-year-olds. My Horse is four years old, an entire weight 8st. 9lbs. My Horse carried that weight. Before the Jockey left the scales I protested that the Horse was a five-year-old, and had carried four-year-old weight. I had a written protest, and handed it in, because I knew he was a five-year-old. I put a £5 note in with it." This evidence clearly refers, not to the

time at which the weighing was taking place, but to the day after the race was run, when, according to a Letter to which we have been referred, the Plaintiff protested against the *Traveller* being declared the winner, stated that he could produce Certificates to prove that he was five years old, and enclosed the sum of £5.

Now, if the Plaintiff really thought that the agreement had been broken, and that it would be unfair for the other party to run his Horse without being weighted, we think he ought to have refused positively to run the race. But we cannot help observing that he was not unwilling that the race should be run, and if his Horse had been the winner, he most undoubtedly would not have objected to receive the stakes, while he had in reserve an objection which he thought might invalidate the race if his own Horse were the loser.

But the Plaintiff also objects that the race was not run under the agreement, because the stakes were not deposited with the Treasurer of the Jockey Club. There is no written rule as to the deposit of the stakes with the Stakeholder of the Jockey Club, nor is there any evidence that there is any inflexible rule upon the subject. All the evidence is contained in a Letter written by the Treasurer to Mr. *Doyle*, in which he says, "I find that the match-money (£1,000) has not yet been paid into the hands of the Treasurer of the *Australian Jockey Club* (Mr. *Martyn*). As the match is to be run under the management of that body, it is necessary that the money should be lodged with the Treasurer previous to starting."

It appeared by the evidence that it was the Plaintiff who refused to allow the money to be paid over to the Treasurer. Mr. *Lackie*, who is one of the Judges of the Jockey Club, said "before the race, the Stewards doubted about acting, not having the stakes. It was put to the Owners and Stakeholder that the money should be given to the Treasurer. They were all present. All fell into the arrangement except *Dines*. *Wolfe* was agreeable, if indemnified. *Doyle* also consented. The stakes were not handed over. The Stewards thought it better that the race should be run, and the money remain. The race was then run." Therefore, supposing it to be a rule of the Jockey Club that the stakes shall be deposited with their Stakeholder, the Plaintiff agreed to run the race under the rules of the Jockey Club, and of course under this rule as to

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the deposit of the stakes as one of them. Could he, then, take advantage of his own non-compliance with the rule, to demand his stakes back again? Put the case another way. The Plaintiff agreed to run the race according to the rules; he must, therefore, be taken to have known that the deposit of the stakes with the Stakeholder of the Club was one of those rules. But he agreed to appoint *Wolfe* to be the Stakeholder, and he paid his £500 to *Wolfe* according to the agreement. This sum must be taken to be in *Wolfe's* hands to abide the event under the agreement; and the agreement incorporates the rules of the Jockey Club. Therefore, the Plaintiff himself, knowing this rule, has expressly agreed that that rule shall not enter into the agreement between him and *Doyle*, and that the money shall be deposited with another Stakeholder. It is, therefore, quite impossible that he can, after the race has been run under that agreement, object that the race was improperly run, and that it was no race at all, because the money had not been paid over to the Stakeholder of the Jockey Club under their rules.

Assuming that such an objection might have been made (it would have been a very extraordinary thing if it could have been under the circumstances); but assuming that an objection might have existed, can it be contended on the part of the Plaintiff, considering his conduct after the race, that it was competent to him to make such an objection to *Doyle* being entitled to the amount of the money which depended upon the race? The 67th Rule of the Club (it may as well be mentioned, although the case does not depend upon it) is in these terms: "When the qualification of any Horse is objected to before starting, the Owner must produce a Certificate, or other proper document or evidence, to the Stewards or Clerk of the course before the race is run, to prove the qualification of the Horse." It is impossible to avoid the observation that, if the Plaintiff really meant to object to the age of *Traveller*, he should have followed this rule, and should have stated his objection to the age of the Horse, and required the Owner to produce a Certificate of his age before the starting. He did nothing of the kind. Then the Rule goes on thus: "And, if he should start his Horse without so doing, the prize shall be withheld for a period to be fixed upon by the Stewards, at the expiration of which time, if

the qualification be not proved to the satisfaction of the Stewards he shall not be entitled to the prize, though his Horse shall have come in first, but it shall be given to the owner of the second Horse. When the qualification is objected to after starting, the person making the objection must prove the disqualification." This condition applies to Mr. *Dines*' case.

The 68th rule is this: "When the age or qualification of a Horse is objected to, either before or after the running, the Stewards shall, if they think fit, order an examination of the Horse's mouth by competent persons, and call for all such evidence as they may require, and their decision shall be final." And the 69th: "Any person requiring a Horse's mouth to be examined must pay the expense of such examination, unless the Horse is proved to be of the wrong age, in which case such expense shall be paid by the owner of the said Horse." Now the Plaintiff says, "I had an objection to this race as being of no value at all—no race at all." But did he stand upon that objection? No! On the day after the race he writes a Letter to the Stewards of the *Australian Jockey Club* in these terms: "Gentlemen,—*Traveller* having started in this match as a four-year-old, I protest against him being declared a winner. I can produce Certificates to prove him five years old. I am, Gentlemen, your obedient Servant, *Richard Dines*. I enclose £5."

What is the fair and reasonable effect of this Letter under the circumstances of this case? It is perfectly clear that it amounts to an acknowledgment that the race was run under the rules of the Jockey Club, the Plaintiff insisting upon one of those rules and his right to take advantage of it, and to take advantage of it precisely in the manner prescribed by the rules. He remits the question therefore to the Committee of the Jockey Club under these particular rules. The jury, constituting themselves a Tribunal of appeal from the Jockey Club, say, that they are of opinion that the Stewards of the *Australian Jockey Club* did not give a full and fair investigation of the circumstances of the case. But, by the 68th rule, the Stewards are to judge of the evidence which is sufficient to satisfy their minds upon the subject referred to them, for "the Stewards shall, if they think fit, order an examination of the Horse's mouth, by competent persons, and call for all such evidence as they may require, and their decision shall be final."

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Therefore, even supposing the Stewards had dealt with the evidence in a very different manner from that in which they appear to have done, still, they being the judges as to what evidence is to satisfy their minds, they must decide for themselves, and their decision is to be final.

But there was no want of a full examination on the part of the Stewards, but the contrary. The ground for denying that the investigation was a full and fair one is that the Stewards refused to adjourn upon the application of the Plaintiff, who desired to examine further witnesses. It appears that upon the first day of the inquiry the Plaintiff gave his evidence, and handed in several Certificates to prove the age, foaling, and branding of the Horse. For what purpose did he require an adjournment? The Certificates had been admitted. He had the full benefit of them. They probably were not the best evidence; but there they were, and they were in his favour. He required an adjournment in order that he might examine as witnesses the persons who had sent the Certificates and who were up the country. Therefore, he only wanted to confirm the Certificates by *vivâ voce* testimony; and we do not think it was at all unreasonable for the Stewards to say "We have had the Certificates. We know precisely all that these witnesses can tell us upon the subject; therefore, we require no further evidence than that which is before us, which enables us to come to a satisfactory decision."

The result is this, that the Plaintiff could not under any view of the case be entitled to a verdict. If there were no decision at all of the Stewards, or if their decision was insufficient on any ground, still, if the race was run, the Plaintiff cannot recover his stakes back again. And he could not be entitled to recover the whole of the stakes without a decision in his favour as to the age of *Traveller*, which he has failed to obtain.

Under these circumstances, there can be no doubt whatever that the New Trial was properly granted by the Supreme Court; and, therefore this appeal must be dismissed with costs.

Solicitors for the Appellant: *Ellis, Parker & Clarke.*
Solicitor for the Respondent: *R. Beddome.*

ALEXANDRE ÉDOUARD KIERZKOWSKI . APPELLANT; J. C.*
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JEAN BAPTISTE THÉOPHILE DORION AND ZÉPHIR DORION . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Old French Law—Lower Canada, Civil Code of—Statutes of—Loan—Bond—Usurious contract—Assignment of right of action.

Exposition and examination of the Usury Laws of *Lower Canada.*

In an action brought to recover a sum of money alleged to have been paid in excess upon a Contract for a loan of £4,875, made in the year 1845, of which £3,325 only was paid to the borrowers, the balance, £1,500, being retained by the Agent of the lender as a *bonus* or premium; no sufficient proof being given of the lender's knowledge of the retention of such *bonus* or premium (which was claimed by the Agent retaining it for alleged services performed in obtaining the loan) and no excess of payment on account of interest proved before the year 1853, when the law of usury in *Canada* was altered: such action held not sustainable, and the judgment of the Court of Queen's Bench in *Canada*, reversing a previous judgment of the Superior Court, upheld, though on grounds different from those stated by the Court of Queen's Bench.

By the old French law, which formerly prevailed in *Lower Canada*, when upon an usurious Contract the principal and legal interest had been fully paid, any money afterwards received by the lender beyond the legal amount due could be recovered back; a right of action, therefore, vested in the person so paying such usurious interest.

By Article 1,570 of the Civil Code of *Lower Canada* such right of action is assignable, the only exception being, in the case of "Judges, Advocates, Attorneys, Clerks, Sheriffs, Bailiffs, and other Officers connected with Courts of Justice," who are prohibited by Article 1,485 of the same Code from becoming "buyers of litigious rights which fall under the jurisdiction of the Court in which they exercise their functions."

By the Statute law relating to usury formerly in force in *Lower Canada* (17 Geo. 3, c. 3, sect. 5), interest at the rate of 6 per cent. only was allowed, and all Contracts whereupon a greater interest was reserved were declared void, and the parties directly or indirectly taking a higher rate made liable to a penalty to the amount of treble the value of the moneys lent. The 16 Vict. c. 80, enacts, that no Contract thereafter for the loan or forbearance of money, made at any rate of interest whatsoever, and no payment in pur-

* *Present:*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE WOOD, and THE LORD JUSTICE SELWYN.

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suance thereof, should make the party to such contract liable to any loss, forfeiture, or penalty, or proceeding civil or criminal, for any usury, any law or custom to the contrary notwithstanding; but provides, that every such Contract shall be void so far only as relates to any excess of interest above 6 per cent. The effect of this Act is, that an usurious Contract no longer subjects a party to any penalty or forfeiture, but is invalid only so far as it stipulates for more than 6 per cent. interest.

Semble, that an action brought after the passing of this Act to recover such excess of payment could not properly be called "a civil proceeding for usury," though brought on account of usury, the Act pointing to a proceeding upon the fact of usury itself, and not upon claims which resulted from it.

THE question in this appeal was, whether the Appellant was entitled to recover back from the Respondents a sum of money which he alleged was, in the year 1854, overpaid by himself and others (through whom he claimed) to the Respondents in respect of a loan made by Dame *Cousineau* to the Appellant and others in November, 1845, and which Contract was alleged by him to have been in its nature usurious.

On the 11th of November, 1845, by a Bond or Obligation executed at *Montreal* before Notaries, the Appellant, acting for himself and his Wife, Dame *Louise Aurélie Debartzch*, *Lewis Thomas Drummond*, Esquire, Advocate, Dame *Josephte Elmire Debartzch*, his Wife, *Samuel Cornwallis Monk*, Esquire, Advocate, Dame *Rosalie Caroline Debartzch*, his Wife, *Edward Sylvestre*, Count of *Rottermund*, and Dame *Marguerite Cordelia Debartzch*, his Wife, acknowledged that he owed to Dame *Cousineau*, the Widow of *Charles Dorion*, represented in the Bond by the Respondent, *Jean Baptiste Théophile Dorion*, her Attorney, a sum of £4,875 currency, for money lent by Dame *Cousineau*, for the purpose of enabling the borrowers to pay off certain debts secured by mortgages affecting the real estate given to them by the Hon. *Dominique Debartzch*, and by this Obligation the sum of £1,500, part of the £4,875, was acknowledged to be paid to the Appellant, and the sum of £3,375, residue of £4,875, was to be paid by Dame *Cousineau* to the Appellant, together with interest from the date of the Obligation, so soon as that sum should be received from the Corporation of *Montreal*, on certain Bonds of which it was secured; and by such Bond or Obligation the sum of £4,875 was agreed to be paid to Dame *Cousineau* at the end of eight years, with interest payable annually; and it was agreed, that in case the borrowers should fail

punctually to pay the interest, the capital sum due on the Obligation should immediately become payable.

By another Obligation, executed on the same day before Notaries, the Appellant for himself, and as Attorney of the same persons as those for whom he acted in the matter of the before-mentioned Obligation, acknowledged that he owed to the Respondent, *Jean B. T. Dorion*, as Curator to the substitution created under the Will of the late *Jacques Dorion*, his Uncle, a further sum of £3,626. 8*s*. 6*d*., which the Appellant and those for whom he acted agreed to pay back to that Respondent after eight years, with interest to be paid thereon half-yearly.

The £3,375 agreed to be advanced by Dame *Cousineau* as part of the consideration for the first Obligation, and the whole of the sum of £3,626. 8*s*. 6*d*., the consideration for the second Obligation, were advanced to the borrowers, and the fact of the advance of these sums was not in dispute in the action under appeal.

With respect, however, to the sum of £1,500, part of the £4,875 mentioned in the first Obligation, and which the Appellant himself acknowledged before Notaries that he received in their presence from Dame *Cousineau*, the Appellant alleged, that this sum was never advanced or paid at all, but was retained by the Respondent, *Jean B. T. Dorion*, whilst the Respondents insisted that the £1,500 was *bonâ fide* paid to the Appellant as stated in the first Obligation, but that the Appellant and his co-borrowers afterwards paid to the Respondent, *Jean B. T. Dorion*, a sum of £1,500 for his own sole use, and for his personal services in connection with the above loans, and that he applied that sum accordingly, without accounting for any part thereof to Dame *Cousineau*.

Louise Aurélie Debartzch, the Wife of the Appellant, died in the year 1850, having by her Will appointed him her universal legatee in usufruct, and having given the *corpus* of her property to her children surviving her Husband. There were two children issue of the marriage, and the Appellant was appointed their guardian.

It appeared that the interest on the aggregate sum of £4,875 having on two occasions previous to the year 1849 fallen into arrear, actions were brought, in 1848 and 1852, by Dame *Cousineau* against the Appellant and his co-borrowers, and judgment suffered

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to go by default. Further proceedings were had between the parties, whereby the time for payment of the sums secured by the above-mentioned two several Obligations was extended.

In the early part of the year 1853, Dame *Cousineau* died, having by her Will appointed the Respondents and *Eustache Dorion*, her Sons, her universal Legatees, the latter of whom afterwards ceded to the Respondent, *Jean B. T. Dorion*, all his rights in his Mother's succession. At the period of Dame *Cousineau's* death a large balance was due to her on the above Obligation.

On the 7th of May, 1853, shortly after the death of Dame *Cousineau*, a deed was executed by Mr. and Mrs. *Drummond*, the Count and Countess de *Rottermund*, and the Respondent, *Jean B. T. Dorion*, acting for the Legatees of Dame *Cousineau*, whereby the first-mentioned parties, in consideration of a payment of £1,500, and £500 for costs on account of the Bond of the 11th of October, 1845, and also in consideration of the *Dorions* granting a delay of four years to pay the capital of the two sums of £4,875 and £3,626, bound themselves to pay the interest on the 11th of November then next, and at the end of four years to pay off the two Obligations in one payment; and by that instrument Mr. and Mrs. *Drummond* gave a fresh security to the *Dorions* for the debt by mortgaging other property belonging to them at *Montreal*.

In September, 1855, Mr. Justice *Mondelet* became purchaser of a portion of the property belonging to Mr. and Mrs. *Drummond*, and the purchase-money was applied to the payment of the principal and interest due on the Obligation of the 11th of November, 1845.

By a deed, dated the 18th of March, 1862, Mr. and Mrs. *Drummond*, Mr. and Mrs. *Monk*, and the Widow of Count *de Rottermund*, granted and assigned all their rights to the Appellant to rescind the first Obligation on the ground of usury, or otherwise to sue for or recover the sum of £1,500, or other moneys paid in respect of the aforesaid Obligation.

Accordingly in October, 1862, an action was instituted in the Superior Court of *Lower Canada* (District of *Montreal*) by the Appellant, suing as well in his own name personally as usufructuary of the property of the late Dame *Louise Debartzch*, his Wife, and as Assignee (*cessionaire*) of the Hon. *L. T. Drummond*, and *J. E. Debartzch*,

his Wife, the Hon. *S. C. Monk*, and *R. C. Debartzch*, his Wife, and Dame *Marguerite Cordelia Debartzch*, Widow of the late *E. Sylvestre* Count *de Rottermund*, and also as Tutor of his minor children, *légataires en propriété* of the property left by their Mother, against the Respondents, of whom *Jean B. T. Dorion* was stated to be sued as well personally, as heir and legatee of his Mother, the late Dame *Cousineau*, and as *cessionnaire* of his Brother, *Eustache Dorion*. The declaration stated, in substance, to the effect before stated, and, by a schedule appended to it, purported to make out that the sums paid in respect of the Obligations, in excess of the sum actually advanced and lawful interest on it, amounted to £5,329. 10*s*., and concluded as follows:—"That by virtue of what was above stated, the Appellant was well entitled to reclaim from the Defendants, jointly and severally, the sum of £5,329. 10*s*. Wherefore the Plaintiff concludes to the effect, that the Defendants be condemned to pay him jointly and severally the said sum of £5,329. 10*s*., with interest, and the costs of the present action."

The Respondents severed in their defence to the action. The Respondent, *Jean B. T. Dorion*, admitted by his pleas, that he had received the sum of £1,500 from the Appellant and the person represented by him, but he stated that Dame *Cousineau* had never bargained for or exacted any *bonus* or usurious interest whatever on the loan, and that she had never authorized him as her Attorney, either directly or indirectly, to bargain for or exact any *bonus* or usurious premium for making or in respect of the loan, and that she had never ratified or approved of any agreement by virtue of which the *bonus* or usurious interest had been exacted or required of the borrowers in respect of the loan; but he stated that, on his own responsibility and on his own behalf, without the knowledge of Dame *Cousineau*, in return for having been instrumental in obtaining the consent of Dame *Cousineau* to the aforesaid loan, and as for compensation for trouble taken by him in the interest, and for the advantage of the borrowers in respect of the loan, he had, about the 11th of November, 1845, but previous to that day, entered into an agreement with the borrowers by which they bound themselves to pay to him, as a reward, a *bonus* of £1,500, exclusive of a sum of £25 which they had agreed to pay for the fees of Counsel employed by Dame *Cousineau* in examining certain title deeds connected with

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the loan; and he further stated, that the *bonus* was his own, and that he had never accounted for the same to any one, and he denied the accuracy of the Plaintiff's accounts, and alleged that there was still owing to the Defendants on the loan more than £3,500; and the Defendant, in his pleas, stated that the Appellant and those through whom he claimed had confirmed the Obligation in manner hereinbefore stated, and that the judgments hereinbefore mentioned had been recorded against them.

The other Respondent, *Zéphir Dorion*, stated in his pleas, that his Mother (Dame *Cousineau*) had advanced to the Appellant the full amount of the money specified in the Obligation signed in her favour, and that the Appellant and the persons represented by him had at all times acknowledged this loan as valid. That if a premium of £1,500 was ever paid to *Jean B. T. Dorion* when he made the above loan, it had been without the authority, knowledge, or consent of Dame *Cousineau*, for whom he acted as Agent in one of the loans, and that she never received any part of this premium; and that if *Jean B. T. Dorion* entered into an agreement with borrowers as to the payment to him of a premium, Dame *Cousineau* was never entitled to the benefit of such an agreement, and that her estate could not be made liable in that respect, and he renounced and disclaimed all interest in respect of the £1,500, and denied that he had ever received any part of it, and stated that a sum of £3,500 was still due on the Bond.

The replication to each of the pleas put in issue the statements therein contained, and averred that there never had been, and could not be, any valid ratification of such a usurious transaction as that complained of, and stated that proceedings to recover the over-payments alleged to have been made as aforesaid, had not sooner been taken because the Appellant and his co-borrowers despaired of being able to prove the alleged usury until the Respondent, *Jean B. T. Dorion*, himself lately deposed in the suit of "*Mitchell* v. *Dorion*," in which he was examined as a witness, that the £1,500 had been paid to Dame *Cousineau* pursuant to an agreement with her to that effect.

Evidence was adduced to prove, that the sum of £1,500 ought to be deducted from the £4,875 secured by the first Bond, and to be treated as having been retained by Dame *Cousineau*. The Appel-

lant relied mainly upon the deposition made by the Respondent, *Jean B. T. Dorion,* in the suit of "*Mitchell* v. *Dorion,*" but the statements then made by him were alleged to have been explained by him in cross-examination, and shewn to have been erroneous, and it was proved (as the Respondents contended) that the Respondent, *Jean B. T. Dorion,* did not retain the £1,500 on account of Dame *Cousineau,* or out of the moneys secured to her by the first Bond, but that the whole of the sums of £4,875 and £3,626. 8*s.* 6*d.* respectively were paid by the Respondent, *Jean B. T. Dorion,* to the borrowers, or to other persons by their direction and on their account, and that the sum of £1,500 was raised by contribution among the borrowers, and was afterwards paid to the Respondent, *Jean B. T. Dorion,* in consideration of, and as remuneration for, services rendered by him in respect of the two loans of £4,875 and £3,626. 8*s.* 6*d.* respectively, and not the first of them only, and that Dame *Cousineau* never herself stipulated for, nor ever authorized him to exact or receive, the sum of £1,500, and never either herself, or by her Agents, received any portion of it; that she never knew that any *bonus* or premium was paid to the Respondent, *Jean B. T. Dorion,* and that he never accounted either to her or to his co-legatees for such sum of £1,500, or any part thereof.

The action was tried in the Superior Court before Mr. Justice *Smith.* The judgment of that Court, delivered on the 31st of December, 1863, was, in substance, as follows:—"Considering that the Plaintiff hath fully proved the facts that at the time of the effecting of the loan to the Plaintiff and his *co-obligés,* as stated in the declaration, by and through the agency of the Plaintiff, by Dame *Cousineau,* on the 11th of November, in the year 1845, for the sum of £4,875 current moneys, being part and parcel of a larger loan then effected by the parties, she, Dame *Cousineau,* did exact from the Plaintiff and his *co-obligés,* through their Agent aforesaid, a sum of £1,500 currency, in the nature of a *bonus* or premium, or usurious interest, and which sum of £1,500 was then and there exacted and deducted from the sum of £4,875, the sum for which the loan was effected from Dame *Cousineau,* upon which total sum, including £1,500, Dame *Cousineau* and her representatives have exacted and received interest: And further, seeing that Dame

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Cousineau did, in truth, advance to *A. E. Kierzkowski*, acting for himself in his own name, and as the Agent as aforesaid of his *co-obligés* named in the Obligation, representatives of the late Hon. *Pierre Dominique Debartzch*, the sum only of £3,325 currency, and not the sum of £4,875, as stated in the Obligation of the 11th of November, 1845, and that the sum of £1,500 was so illegally and usuriously taken and received by Dame *Cousineau* contrary to law and to the Statute in such case made and provided; And further, considering, that at the date of the institution of this action the Defendants had exacted and received from the Plaintiff and his *co-obligés*, his *cédants*, Debtors named in the same Obligation, divers sums of money upon the obligation, amounting at the date of service of process in this cause, with interest, to the sum of £3,958. 6*s.* 0*d.* over and above the amount really and legally due to the Defendants, and that *A. E. Kierzkowski*, acting now in his own name, under the various transfers from the Debtors mentioned and described in the obligation first above-mentioned, by reason of which transfers the right to demand back the said sum, and all excess of interest so illegally retained and exacted, is vested in him, as well as all other amounts paid by the Plaintiff and his *co-obligés*, his *cédants*, upon the amount loaned by the Dame *Cousineau* by virtue of the deed of Obligation first above-mentioned, hath a right in law to claim and demand from the Defendants jointly, solidarily, and severally, as the representatives of Dame *Cousineau*, all such excess of capital and interest illegally retained: And further, seeing that the Defendants have altogether failed to establish the material facts set up in their said exceptions and pleas severally pleaded: And further, seeing that it is established that the sum of £3,958. 6*s.*, is the amount of capital and interest which Dame *Cousineau* and the Defendants had so illegally exacted and retained, and which the Defendants had in their hands at the date of the institution of this action, the Court doth condemn the Defendants jointly and severally to pay to the Plaintiff the sum of £3,958. 6*s.*, with interest, from the 4th of October, 1862, date of service of process in this cause, and further condemn the Defendants to pay the costs of this action jointly and severally, and *Zéphir Dorion* to pay the costs of his separate plea."

The Defendants (the Respondents in the present appeal) sepa-

rately appealed against this judgment to the Court of Queen's Bench of *Lower Canada* (appeal side).

The first hearing of the appeals took place on the 8th and 9th of March, 1865, before the Chief Justice *Duval*, and *Aylwin*, *Meredith* and *Mondelet*, three puisne Judges of that Court. The Court reserved its judgment, and on the 6th of June, 1865, directed a re-argument on certain points; but on the 1st of March, 1866, the Court determined that the appeals should be heard entirely *de novo* on the merits. Such hearing *de novo* took place on the 2nd and 3rd of March, 1866.

Separate judgments were delivered on the 9th of March, 1866. The judgment on the appeal of the Respondent, *Jean B. T. Dorion*, in which Mr. Justice *Meredith* dissented, proceeded entirely on the ground, that Mr. and Mrs. *Drummond* were the only persons entitled to claim repayment of the sums overpaid on the alleged usurious obligation, and that the Appellant had no right of action. The judgment on the other appeal stated, as its sole ground, that, the Plaintiff had not proved the material allegations of his declaration against the Respondent, *Zéphir Dorion*. The result was, that the action of the Appellant was dismissed with costs against both the Respondents.

The Court of Queen's Bench, while the appeals were depending before them, considered that the chief question which arose related to the law formerly prevailing in *Lower Canada* with reference to usurious contracts, and the modifications which had been introduced into that law by subsequent Provincial Statutes.

The Statute Law as to usury which was in force in *Lower Canada* in the year 1845, the date of the transaction in question, was contained in the Act, 17 Geo. 3, c. 3, sect. 5, the terms of which were as follows:—

"From and after the publication of this Ordinance it shall not be lawful upon any Contract to take, directly or indirectly, for loan of any moneys, wares, merchandises, or other commodities whatsoever above the value of £6 for the forbearance of £100 for a year, and so after that rate for a greater or lesser sum in value, or for a longer or shorter time, and the said rate of interest shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid, and all Bonds, Con-

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tracts, and Assurances whatsoever, whereupon or whereby a greater interest shall be reserved and taken shall be utterly void, and every person who shall either directly or indirectly take, accept, and receive a higher rate of interest shall forfeit and lose for every such offence treble the value of the moneys, wares, merchandises, and other things lent or bargained for, to be recovered by action of debt in any of the Courts of Common Pleas in this Province, a moiety of which forfeiture shall be to His Majesty, and the other moiety to him or them that will sue for the same."

Changes had, however, taken place in the usury laws of *Lower Canada* between the years 1845 and 1862.

By the *Canadian* Act for the year 1853 (16 Vict. c. 80), it was enacted, as follows:—

"II. That no Contract to be hereafter made in any part of this Province for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and no payment in pursuance of such Contract, shall make any party to such contract or payment liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury, any law or Statute to the contrary, notwithstanding.

"III. Provided always nevertheless, and be it enacted, that every such Contract and every security for the same shall be void so far, and so far only, as relates to any excess of interest thereby made payable above the rate of £6 for the forbearance of £100 for a year, and the said rate of 6 per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

By the *Canadian* Act for the year 1858 (22 Vict. c. 85), it was enacted by section I., that from and after the passing of that Act, the 3rd section of the Act mentioned in the preamble of the 16 Vict. c. 80, is "hereby repealed, except only as to Contracts made after it came into force and before the passing of this Act, as to which it shall remain in force."

"II. It shall be lawful for any person or persons other than those excepted in this Act to stipulate for, allow, and exact on any Contract or agreement whatsoever, any rate of interest or discount which may be agreed upon."

In 1859, another Act was passed (23 Vict. c. 58), which con-

tained the following provision:—"I. No contract made in this Province between the 24th day of March, 1853, and the 16th day of August, 1858, for the loan or forbearance of money or money's worth at any rate of interest, and no payment made in pursuance of such Contract, shall render any party to such Contract or payment liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury; and no such contract or any security for the same shall be void in the whole, but only so far as it relates to any excess of interest thereby made payable above the rate of 6 dollars for the forbearance of 100 dollars for a year. But in all such cases the rate of 6 per cent. interest, or such lower rate as agreed on, shall be allowed when it was the agreement of the parties that interest should be paid."

The present appeals were from the above judgment of the Appeal Court dismissing the Appellant's action.

Mr. *H. Cole*, Q.C., and Mr. *Wickens*, for the Appellant:—

There are two questions in this case. First, whether the Obligation or Bond to Dame *Cousineau* of the 11th of November, 1845, was not usurious, and, therefore, illegal and void, by reason of the retention of the sum of £1,500, which was a large part of the principal sum which this Bond purported to secure. And secondly, whether the Appellant, as representing all the Obligors in that instrument, could sue in his own name to recover the money overpaid by the Obligors.

With regard to the question of usury, that must be governed by the Statute Law of *Lower Canada* which prevailed at the date of the transaction. The Canadian Usury Law then in force was the Act, 17 Geo. 3, c. 3, sect. 5, which prohibited a larger amount of interest than 6 per cent.: Revised Acts of *Lower Canada*, p. 312. The retention by *Jean B. T. Dorion* of £1,500, as Agent on behalf of Dame *Cousineau*, by way of *bonus*, was in contravention of the then existing law. None of the subsequent Statutes relating to the Usury Laws, the 16 Vict. c. 80, the 22 Vict. c. 85, and the 23 Vict. c. 58, though they modify the law, in any way alter or cure the original vice of the transaction. It is clear upon the evidence, that the sum of £1,500 was retained by *Jean B. T. Dorion* as Agent for his Mother, who signed the Obligation in ignorance of

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the retention of that sum; that, according to English law, which is the same in this respect as the law of *Lower Canada*, was not binding on her; but the retention of any part of the loan is usury, and the Appellant is entitled to recover back the sums paid with interest: *Scurrey* v. *Freeman* (1); *Fitzroy* v. *Gwillim* (2); *Jaques* v. *Withy* (3); *Bosanquet* v. *Dashwood* (4); *Roberts* v. *Goff* (5). So by the French law: *Rolland de Villarques, Dict. de Droit, Tom.* vii. pp. 286-7, *Verbo. Prêt à intérêt* (18); *Pothier, Tr. de l'Usure*, No. 90.

Then, secondly, as to the rights and remedies of the Obligors in respect of the usurious nature of the Obligation, and its consequent invalidity, there never was any waiver by them. The acts relied upon by the Appellant as ratifications of the original Contract were previous to the alteration in the usury laws. That alone would establish our right: *Siret, Codes annotés*, Art. 1907, p. 867 [Ed. 1859]. The proceedings taken against the Obligors for the purpose of enforcing the Bonds, though they let judgment go by default, could neither ratify or make valid the first Obligation, which was in its inception usurious. Even the ratification of such a Contract is ineffectual, notwithstanding the enactment of the *Lower Canada Civil Code*, § 1214, which does not apply to such a transaction as this. As to the title of the Appellant to sue in his own name, all the rights of the parties interested had become effectually vested in him; and, according to the law in force in *Lower Canada*, representing, as he did, all the Obligors in the Bond of the 11th of November, 1845, he was entitled to sue on their behalf for whatever was due to them: *Lower Canada Civil Code*, Arts. 761, 795, 1570; *Macardè, Explic. du Code Nap. Tom.* iii. p. 213; *Ib. Tom.* vi. p. 194; *Pothier, Tr. de l'Usure*, No. 114 [8vo. Ed. 1835], Part ii. p. 114; *Rolland de Villarques, Dict. de Droit, Tom.* vii. p. 286, *Verbo.* "*Prêt à intérêt*" (18); *Inst. Lib.* 4, *Tit.* i. § 1.

Sir *R. Palmer*, Q.C., and Mr. *N. Lindley*, for Respondents:—

The questions argued by the Appellant are perfectly distinct. The first, as regards the alleged usurious nature of the transaction, is wholly independent of the Appellant's right to sue. The action

(1) 2 B. & P. 381.
(2) 1 Term Rep. 153.
(3) 1 H. Bla. 65.
(4) Cas. temp. Talbot, 38.
(5) 4 B. & Ald. 92.

was brought for money overpaid; the *onus probandi*, both as to the fact of over-payment as well as to the amount overpaid, lay upon the Appellant, not, as argued the other side, on the Respondents. The main question is, was there usury? Now, the loan by Dame *Cousineau* was in no sense usurious; she never agreed to receive, and in fact never did receive, any sum of money by way of usurious *bonus* or premium on the loan of £4,875 made and advanced by her. The £1,500 premium received by the Respondent, *Jean B. T. Dorion*, was paid to and received by him for his own use without the knowledge or privity of Dame *Cousineau*, and she could not, therefore, incur any liability in respect thereof. All the evidence in the cause shews that she was not connusant of the payment of any premium to the Respondent, *Jean B. T. Dorion*. But assuming that the loan was usurious, the Appellant, as well as those through whom he claims, having, in 1848 and 1851, acknowledged the validity of the Obligations given to Dame *Cousineau*, and suffered judgment in actions brought by her in 1848, 1849, and 1851, on the same Obligations, to go by default, the Appellant is concluded from impeaching it on such ground, and such acquiescence in the claim was an acknowledgment and ratification of the Bonds. Neither was it within the meaning of the *Canadian Act*, 17 Geo. 3, c. 3, sect. 5. That Act was repealed in 1853, before any sums sought to be recovered by the Appellant were paid; and it is not pretended that any usurious payment was made or taken while the Act of 17 Geo. 3, c. 3, sect. 5, was in force. Then, even if the original Contract was void while the Act was in force, it was capable of being ratified, and was ratified, after the repeal of the Act: *Toullier, Contrats et Obligations Conventionells, Tom.* iv. Art. 561. These are conclusive grounds of objection to the Appellant's action. The question of usury does not depend on the French law, and the authorities cited in respect thereof are beside the question; the whole case must be determined by the Statute Law of *Lower Canada*, and must be governed by the 16 Vict. c. 8, ss. 2 and 3, the 22 Vict. c. 85, ss. 1 and 2, and the 23 Vict. c. 58, s. 1. There is another ground of objection on the face of the proceedings. The action is not brought to recover the premium of £1,500, nor the whole of the moneys paid in respect of the loan, as void on the ground of usury, but is brought for the excess of certain alleged payments over a principal

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sum admitted to have been *bonâ fide* advanced, with interest at a lawful rate, and there is no proof that more than that principal money, with interest, has, in fact, been repaid: *Wilson* v. *Metcalfe* (1); *Montgomery* v. *Callander* (2). The accounts clearly prove this. Even admitting that the repeal of the Act, 17 Geo. 3, c. 3, sect. 5, did not render the Bond valid, which we insist it did, yet that repeal rendered it legal for the *Drummonds* to recognise and ratify the Bond, if they chose to pay the money in discharge of it, or at least it constituted a new Contract: *Pothier, Tom.* ii. p. 780; *Pand., Tit.* xii. § 6; *Pothier, Tom.* vii. pp.664-5, *Lib.* iii. *tit.* 3 and 5, on Extinction of Obligations.

1868 *Dec.* 23.

Judgment was reserved, and now delivered by

LORD CHELMSFORD:—

This is an appeal from the judgment of the Court of Queen's Bench of *Lower Canada,* reversing a judgment of the Superior Court of that Province, in an action by the Appellant against the Respondents.

The action was brought to recover from the Defendants, jointly and severally, as universal Legatees of their Mother, Dame *Cousineau,* a sum of £5,329. 10*s.* alleged to have been paid to them by the Plaintiff in excess of the amount of legal interest payable under a Contract for the loan of £4,875 by Dame *Cousineau* to the Plaintiff and his Wife, *Lewis Thomas Drummond* and his Wife, *Samuel Cornwallis Monk* and his Wife, and *Edward Sylvestre,* Count *de Rottermund,* and his Wife.

The declaration in the action states, that by an Obligation, dated the 11th of November, 1845, the Plaintiff, in his own name, and in the names of the other borrowers, acknowledged to have received, by way of loan, from Dame *Cousineau* (represented by the Defendant, *Jean B. T. Dorion*), a sum of £4,875, which they bound themselves to repay to Dame *Cousineau* in manner mentioned in the Obligation. That the Plaintiff received from the Defendant, *Jean B. T. Dorion,* acting as aforesaid, only £3,325, and that he retained the balance of £1,550 as a *bonus* or premium, or illegal and usurious interest. The declaration states the death

(1) 1 Russ. 530. (2) 14 Sim. 79.

of Dame *Cousineau*, leaving the two Defendants and their Brother, *Eustache Dorion*, her universal Legatees, and that the rights of *Eustache Dorion* having been ceded to *Jean B. T. Dorion*, the two Defendants are the only representatives of their Mother. It then states various payments made on account of principal and interest due on the Obligation of the 11th of November, 1845, which, on the 6th of March, 1854, left a balance of £2,138. 8*s.* 5*d.*; and that on that day Mr. and Mrs. *Drummond*, two of the Debtors in the Obligation, sold to the Honourable Judge *Mondelet* part of the property charged with the payment of the loan; and that on the 1st of September, 1855, by an arrangement between Judge *Mondelet* and the two Defendants, and divers other Creditors of the vendors, he paid to the Defendants a sum of £78. 15*s.* 9*d.*, and afterwards another sum of £5,023. 2*s.* 8*d.*, on account of principal and interest upon the Obligation. That as at this time there was due upon the Obligation only the sum of £2,138. 8*s.* 5*d.*, the Defendants received beyond the principal and legal interest at 6 per cent. a sum of £2,963. 10*s.* That this sum, with interest, amounts to £5,329. 10*s.*, which the borrowers are entitled to recover from the Defendants, with interest. The declaration then states an assignment to the Plaintiff of all the interests and rights of action of the other Debtors in the Obligation of the 11th of November, 1845, to demand and recover the usurious premium of £1,500 and interest, and all other illegal and usurious interests paid in respect of the Obligation, by which, as the Plaintiff alleges, he is alone entitled to maintain the action.

The plea of the Defendant, *Jean B. T. Dorion*, alleges, that the loan in question was made by Dame *Cousineau* through his agency, and that she never stipulated for, or required, any *bonus* or usurious interest upon such loan. That upon his own responsibility and for his own interest, unknown to Dame *Cousineau*, and to indemnify him for the steps and proceedings taken by him in the interest and for the profit of the borrowers, he entered into an agreement with them by which they bound themselves to pay him a bonus of £1,500. And that on the 11th of November, 1845, after having made the before-mentioned loan of £4,875 for Dame *Cousineau*, the borrowers paid him, on his own account, the said sum of £1,500.

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The Plaintiff, in his answer to this plea, says, that the sum of £1,500 was exacted by Dame *Cousineau*, acting by the Defendant as her Agent, and was retained, not for himself, but for and in the name of Dame *Cousineau*.

The Defendant, *Zéphir Dorion*, put in a separate plea, in which all that it is necessary to notice is, that he repudiated all interest in the *bonus* paid to the other Defendant, and renounced all claim to any part of it.

Upon the issues thus raised between the parties, and after hearing evidence on both sides, the Superior Court was of opinion, that the Plaintiff had proved the facts alleged in his declaration. That the £1,500 was exacted by Dame *Cousineau* as a *bonus* upon the loan made by her, and was deducted from the sum of £4,875, which she agreed to advance, and the Court condemned the Defendants, as her representatives, to pay to the Plaintiff the sum of £3,958. 6*s*., the amount of excess of interest which they had exacted and received from him, together with interest, and the costs of the action.

The Defendants appealed separately to the Court of Queen's Bench from this judgment.

The principal grounds of appeal alleged by *Jean B. T. Dorion*, were:—That the Plaintiff had not proved the facts alleged in his declaration; that it was proved that if *Jean B. T. Dorion* received money from the Plaintiff, it was paid to him on his own account and for his own benefit, and was not received by Dame *Cousineau*, and, therefore, her Legatees could not be made liable for it; and that the Plaintiff and the other borrowers of the moneys confirmed and ratified the Obligation of the 11th of November, 1845.

The other Defendant, *Zéphir Dorion*, in the *factum* upon his appeal, said that the only difference which existed between his defence and that of *Jean B. T. Dorion* was, that his Mother, Dame *Cousineau*, never stipulated for the premium of £1,500, nor authorized her Agent, *Jean B. T. Dorion*, to require any such premium for himself; that she never received any part of the premium, which was taken by *Jean B. T. Dorion* for his own benefit; that Dame *Cousineau* incurred no responsibility in respect of it; and that he (*Zéphir Dorion*) repudiated every agreement which might have been made by *Jean B. T. Dorion* as to the premium of £1,500.

The Court of Queen's Bench gave judgment for *Zéphir Dorion*, on the ground that the Plaintiff in the Court below had not proved, as to him, the material allegations of his declaration. And upon the appeal of *Jean B. T. Dorion*, they reversed the judgment of the Superior Court, because (as they held) the evidence established that the money claimed by the Plaintiff, under and by virtue of the transfer of the 18th of March, 1862 (the assignment by the other Debtors on the Obligation of the 11th of November, 1845, of all their claims and rights of action in respect of the alleged usury), was paid through and by *Lewis T. Drummond* and his Wife, who alone could claim the amount if usuriously and illegally exacted, and that the other Assignors, who had paid no part of the money, had no right of action against the Defendants.

The present appeal is from both these judgments. Their Lordships cannot acquiesce in the reasons assigned by the Court of Queen's Bench for reversing the judgment of the Superior Court in the case of *Jean B. T. Dorion*.

It seems clear, that by the old French law which prevailed in *Lower Canada*, when, upon an usurious contract, the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount due may be recovered back from him: *Pothier*, "*Traité de l'Usure*," *Tom.* iv. p. 114, Art. 113. A right of action, therefore, is vested in the person so paying such usurious interest; and by the law of *Canada* such right of action is assignable. The Civil Code of *Lower Canada*, which, though not established till 1866, embodies all such provisions relative to civil matters as were in force at the time of the passing of the Act respecting the codification of the Laws of that Province, may properly be referred to for the Law on this point. By Article 1,570, "The sale of debts, and rights of action against third persons, is perfected by the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature." And the only exception to the right of dealing with these subjects is to be found in Article 1,485, which prohibits "Judges, Advocates, Attorneys, Clerks, Sheriffs, Bailiffs, and other Officers" connected with Courts of justice, from becoming buyers of litigious rights, which fall under the jurisdiction of the Court in which they exercise their functions."

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Assuming that Mr. and Mrs. *Drummond* were entitled to recover back what they paid beyond the amount of principal and legal interest, they had by Law an assignable right of action. This right of action, by the instrument of the 18th of March, 1862, they transferred and made over to the Appellant in the fullest and amplest manner. The other parties named in the obligation of the 11th of November, 1845, joined in this assignment. Whether they were bound to repay to Mr. and Mrs. *Drummond* their shares of the money so paid is immaterial. The right of action to recover back the money was vested either in Mr. and Mrs. *Drummond* alone, or in all the parties to the Obligation jointly. If all of them were entitled to maintain an action, the Appellant has the assignment of all; and if the sole right of action was in Mr. and Mrs. *Drummond*, they have transferred that right to the Appellant, and the joinder in the instrument of assignment of any number of persons who had nothing to assign, cannot affect, or in any way prejudice, the validity of the assignment by the persons who alone were interested.

It has, very properly, not been attempted to maintain the judgment of the Court of Queen's Bench on the ground upon which it was placed in the case of the Defendant, *Jean B. T. Dorion.*

The questions which their Lordships have been called upon to consider in this appeal are:—

First, whether the Plaintiff has proved the allegation in his declaration, that the Contract between him and Dame *Cousineau* was an usurious Contract by reason of her having stipulated for and received a sum of £1,500 as a *bonus* or premium for the loan of £4,875, which was to be repaid with full legal interest of 6 per cent. upon the whole sum lent.

Secondly. If the original Contract was illegal and void by the Usury Laws of *Lower Canada* in force at the time of its being entered into, whether transactions which took place between the parties after a change of those Laws either ratified and confirmed the Contract itself, or substituted for it another contract founded upon good and valid consideration.

The first question is one entirely of fact. The Plaintiff was bound to prove that the loan upon which the £1,500, was retained was made by Dame *Cousineau,* and that the retention was for her

benefit. If it were not, the Respondents could not be liable in the character in which they were sued, that of her Legatees. It was not necessary to shew that Dame *Cousineau* personally received or retained the £1,500 for her own use. If she either authorized her Agent, *Jean B. T. Dorion*, to retain it for himself out of the loan made by her, or, knowing that he had so retained it, ratified what he had done, her contract would have been usurious.

The facts which appear to be clearly established are, that an advance of £10,000, having been originally required, it was arranged that a sum of £1,500, should be given by the borrowers for this advance, and that when it was afterwards found that no more than £7,000 could be lent, no reduction was made in the sum to be paid in respect of the loan. These facts are quite independent of the question to whom and for what the £1,500 was to be paid. The loan of £7,000, was made in two sums, one of £4,875 by Dame *Cousineau*, the other of £3,626 by *Jean B. T. Dorion* out of an estate of which he was Curator; but the £1,500 was deducted and retained out of the sum advanced by Dame *Cousineau*. This is proved by the fact that Obligations having been entered into for repayment to the lenders respectively of the sums each advanced, both dated on the 11th of November, 1845, that which was given to Dame *Cousineau* states that the £1,500 was paid at the time of the execution of the deed, and received as part of the loan of £4,875.

This statement in the deed is directly opposed to the Appellant's case. He is compelled, therefore, to rely upon witnesses to prove the essential fact upon which alone he can recover in this action, viz., that the usury which he alleges entered into the Contract with Dame *Cousineau*.

The principal witness produced by him to prove his case was the Notary, *Leblanc*, who was employed by the Appellant and the other proposed borrowers to negotiate for the loan. He went with the Appellant to *St. Eustache*, where Dame *Cousineau* was residing, and saw her in the presence of her son, *Jean B. T. Dorion*. He stated that, as well as he could recollect, the Appellant addressed himself to Dame *Cousineau*, and that it was perfectly understood that the loan was to be made at a rate above the legal interest, and this by the payment of a premium of £1,500. That

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on occasion of the interview with Dame *Cousineau*, the Appellant, to the best of the witness's recollection, remarked that the premium demanded was very high; to which either *Jean B. T. Dorion*, or Dame *Cousineau*—but he believed it was *Jean B. T. Dorion*—said they could place out their capital at a more advantageous rate; but, the witness added, this was said in the presence of Dame *Cousineau*. Upon his cross-examination, he said it was M. *Kierzkowski* who held the conversation about the premium, and with *Jean B. T. Dorion*, though in the presence of his Mother.

M. *Leblanc* spoke, as he was likely to do at the distance of eighteen years, very uncertainly, as to the particulars of a conversation in which he did not take much part, and to which his attention had probably not been called in the intervening period. He stated that M. *Kierzkowski* took the principal part in whatever conversation took place, and that it passed between him (the Appellant) and *Jean B. T. Dorion*. From the Appellant, therefore, we should naturally expect the best information respecting this important interview with Dame *Cousineau*, but he spoke with even more uncertainty than M. *Leblanc*. He said, "I only saw Dame *Cousineau* once upon the subject of the loan in question, and I believe I spoke to her about the premium, and told her the premium was too much. I think she made the same remark as her Son, that they could lay out their capital on more advantageous terms."

This, at best, is but slight evidence to fix Dame *Cousineau* with the knowledge of, and make her a party to, the alleged usurious transaction. But, weak as the evidence is, it is much more weakened by other witnesses produced by the Appellant himself, and especially by the evidence given by M. *Leblanc* upon the subject of this loan in a suit of "*Mitchell* v. *Jean B. T. Dorion*," in which he was a witness. Upon this occasion he never mentioned the name of Dame *Cousineau* in connection with the loan, but stated that all the arrangements for the loan, and all the stipulations as to the premium, passed with *Jean B. T. Dorion*. *Jean B. T. Dorion* himself was called as a witness in that suit, and though he alleged that the sum of £1,500 was actually deducted from the money advanced by Dame *Cousineau*, he admitted that it was retained as a premium in respect of the whole loan.

It must be observed, that in this other suit, if M. *Leblanc* had not kept Dame *Cousineau's* name out of the transaction it would have prejudiced the Plaintiff's case for whom he was called: and that if he had not proved in the present action that she took an active part in the negotiations for the loan and the premium, the Appellant must have failed.

The whole proof of Dame *Cousineau's* participation in the usurious agreement rests upon the Appellant and his witness, M. *Leblanc*. He produced other witnesses, but their evidence either added nothing, or was unfavourable to his case. M. *Moreau*, an *Avocat*, stated that the transaction of the loan was conducted by *Jean B. T. Dorion*, Dame *Cousineau* not at all interfering in the matter; and Judge *Monk*, who was one of the borrowers named in the Obligation, knew nothing of the transaction except what was reported to him by the Appellant and M. *Leblanc*, but understood (of course from them) that *Jean B. T. Dorion* agreed to lend the money, and exacted the *bonus* of £1,500.

The Appellant examined *Jean B. T. Dorion*, who swore in the most positive terms that the affair of the premium was his own personal affair. He said he required it to pay him for all the time he had to occupy himself in the matter, and for the loss of his practice as a Physician for twelve months while he was ascertaining the value of the property of the borrowers, searching the Registers, remaining a great part of the time at *Montreal*, travelling a great deal, and incurring an infinite number of other expenses. He also said that his Mother never spoke to M. *Leblanc* about a premium, that all she did was to consent to the loan, and that she died without knowing that he had received the premium.

Of course this evidence (if believed) was fatal to the Appellant's case, but he probably thought that he might safely make *Jean B. T. Dorion* his witness, as in a former suit brought against him on behalf of the heirs of his Brother, *Jacques Dorion*, in which the question was on whose account he received the £1,500 premium; he swore that it was not retained by him for the heirs of *Jacques Dorion*, but as Agent to his Mother, Dame *Cousineau*. He swore further, that the affair was settled between the Notary, M. *Leblanc*, and his Mother, and that he remembered many and long conversations between them, which ended in her consenting to a certain

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loan at a certain premium, and (he added) it was only by the wish of his Mother and upon what she told him, that he consented to act in the affair.

Upon comparing the evidence given by *Jean B. T. Dorion* with that which he gave in the present suit, it is impossible to place the slightest reliance upon his testimony, as he evidently swore just as it suited his interest upon the particular occasion. In the suit with the heirs of *Jacques Dorion* he could only protect himself from the claim made upon him by swearing that his Mother exacted the premium and received it for her own benefit, and he swore accordingly. In the present suit, which alleged that the £1,500, was exacted and retained by him for his Mother, Madame *Cousineau*, if he had repeated this evidence, he would have established his liability as her Legatee, and he, therefore, swore positively the other way.

But by thus proving the contradictory evidence as to the transaction given by *Jean B. T. Dorion*, the Appellant could not call upon the Court to believe what he had formerly sworn, and to discard his testimony in the present suit as worthless. There were no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit, and to dismiss it without further consideration.

The Defendant, *Zéphir Dorion*, produced two witnesses to prove that, upon the occasion of the Appellant and M. *Leblanc* going to the residence of Dame *Cousineau* at *St. Eustache*, in 1845, she was unwell, and in her bedroom, and never came down stairs or spoke to them while they were there. It is unnecessary to dwell upon this evidence, which is certainly open to the objection that it refers to events which occurred many years before, and in which one of the witnesses (at least) had no interest to retain it in his memory.

In the opinion of their Lordship the Appellant failed entirely to prove the allegation in his declaration that the contract with Dame *Cousineau* was tainted with usury. That she should have taken a prominent, or, indeed, any part in the transaction, after she had entrusted the management of it to *Jean B. T. Dorion*, and especially when he was present, seems, from the account given of

her want of education, and the state of her health, to be highly improbable. There is great reason to believe that Dame *Cousineau* gave *Jean B. T. Dorion* the sum she was to advance upon the execution of the deed, and that he either retained it, or paid it over and received it back at that time. M. *Leblanc*, in his evidence in another suit, speaking of the transaction, said, "After the execution of the obligation, I saw *Kierzkowski* count the money, but I did not count it myself, nor did I know how much money was given upon the occasion."

The only money that could pass at that time is the £1,500. For by the Obligation the sum of £1,500 is stated to have been counted and delivered in the presence of the Notaries to *Kierzkowski*, who thereby acknowledged the same. And the sum of £3,375, the remainder of the advance by Dame *Cousineau*, was only to be paid when she received it from the Corporation of *Montreal*, who were indebted to her in that amount.

The Appellant's case might be disposed of upon the ground of its having failed upon the facts, but their Lordships are unwilling to dismiss the appeal without considering the defence in point of Law, which has been argued upon the assumption that the case of usury has been proved against the Defendants.

It was contended on their behalf, that the Contract was either subsequently ratified, or that a new Contract was substituted for it, founded upon a sufficient consideration.

At the time of the agreement for the loan, the Act respecting usury, which was in force in *Lower Canada*, was that of 1777 (1), which provided that "all Bonds, Contracts, and Assurances whatsoever, whereupon or whereby a greater interest (than 6 per cent.) shall be reserved and taken, shall be utterly void; and every person who should either directly or indirectly take, accept, and receive a higher rate of interest should forfeit and lose treble the value of the moneys, &c., lent."

There can be no doubt that if the £1,500 had been retained on the loan by Dame *Cousineau*, that the moment 6 per cent. was paid upon the entire sum usury would have been committed, for which the lender would have been liable to the penalty; but no

(1) 17 Geo. 3, c. 3, sect. 5. Revised Acts and Ordinances of Lower Canada, p. 312. Montreal, 1845.

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excess of interest could have been recovered back till the payments had amounted to a sum exceeding the principal and legal interest.

In this case there was no excess of payment before the 24th of March, 1853, when an Act was passed in *Lower Canada* which altered the law of usury.

That Act enacted "that no Contract to be hereafter made in any part of this Province, for the loan or forbearance of money at any rate of interest whatsoever, and no payment in pursuance of such contract, shall make any party to such Contract or payment liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding." And it provided, that every such Contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of interest thereby made payable above the rate of £6 for the forbearance of £100 for a year, and the said rate of 6 per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

It was contended on the part of the Respondents that this Act prevented the Plaintiff recovering back any usurious interest which was paid in excess of principal and legal interest under the contract. But an action to recover such excess could not properly be called "a civil proceeding for usury," though it would be brought on account of usury; the words of the Act evidently pointing to a proceeding upon the fact of usury itself, and not upon claims which resulted from it.

On the part of the Appellant it was argued, that the Act of 1853 leaves an usurious contract still a void Contract, as it was before the passing of the Act. But the words "such Contract or security shall be void so far, and so far only, as relates to any excess of interest, &c.," can only mean that the lender shall not recover more than 6 per cent.; not that the Contract itself shall be affected by the stipulation for more than legal interest. The whole effect of this Act is, that an usurious Contract shall no longer subject a party to any penalty or forfeiture; but that it shall be invalid so far as it stipulates for more than 6 per cent.

Upon the subject of the alleged ratification of the usurious Contract, the Appellant's Counsel cited the authority of many eminent

Writers upon French law, to shew that any number of confirmations or compromises made while the Debtor was under the pressure of the usury, could not be urged as a defence to his action to recover back the money paid by him beyond the legal rate of interest. To which it was answered, that the transactions which recognised and ratified the contract all took place after the Act of 1853, which had made usurious contracts no longer unlawful. And *Toullier*, under the head of "*Contrats et Obligations Conventionelles*," vol. iv., Article 561, was cited, where, upon the subject of the ratification of Contracts, which are void from regard to public order or the general interests of society, after stating that "*la ratification serait elle-même infectée des mêmes vices que l'acte ratifiée*," he adds, "*Cependant si les choses en étaient venues au point où la Convention cesserait d'être illicite et pourrait pendre naissance, elle pourrait alors être ratifiée, soit expressément soit tacitement.*"

But the Contract of the 11th of November, 1845, could not have had a legal existence, nor have been enforced in its entirety after the Act of 1853; it would only have been available to the extent of enabling the lender to recover the legal interest of 6 per cent. Therefore, no subsequent confirmation or ratification of it, supposing it to have been originally usurious and void, could afterwards have given it complete validity.

But the case of the Respondents does not rest upon mere ratification. They assert that the old Contract has been entirely done away with, and a new one substituted for it upon a good and sufficient consideration, and that it was under the latter Contract the payments sought to be recovered were made. No payment beyond the amount of principal and legal interest was made until the year 1855. But on the 7th of May, 1853, a Deed was executed by Mr. *Fraser*, as Agent for Mr. and Mrs. *Drummond*, and for the Count and Countess *de Rottermund* and *Jean B. T. Dorion*, acting for the Legatees of Dame *Cousineau*, by which the first-named parties became bound to pay the balance of interest due on the 11th of November then next, and in consideration of this the *Dorions* granted a delay of four years to pay the capital of the two obligations of £4,875 and £3,626 8*s.* 6*d.*, and at the end of that time the capital of the two Obligations was to be paid in one payment; and Mr. and Mrs. *Drummond* gave a new security for the

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debt by mortgaging to the *Dorions* property belonging to them in *Montreal.*

This was not a ratification of the Contract of the 11th of November, 1845, but a new Contract made upon totally different terms, and in consideration of forbearance, and with an additional security given for performance.

It is not pretended, however, that there was any actual taking of usurious interest until after the 1st of September, 1855, when Judge *Mondelet* purchased some property of Mr. and Mrs. *Drummond,* and a Deed was executed whereby he agreed to pay the purchase-money in satisfaction of Debts of the vendors, and amongst them what was due to the *Dorions,* who were parties to the deed. The transaction was to this effect:—the *Drummonds* had contracted to sell their property to Judge *Mondelet;* the *Dorions,* having a charge upon the property, intervened with other Creditors; the amount then due to them was settled and stated; they agreed to take payment in a certain way from Judge *Mondelet* out of the purchase-money. The Deed expressly states, that they entered into this engagement in order to take from Judge *Mondelet* any reasons he might have for abandoning the contract of purchase. By the Deed, also, the *Dorions* give up to the *Drummonds* the additional security for the debt which they had given by the deed of the 7th of May, 1853. These are new considerations moving from the *Dorions* sufficient to support the transaction of the 1st of September, 1855, as a new Contract. Under that Deed the *Dorions* received a large sum of money from Judge *Mondelet,* which made the payments to them greatly exceed the amount of principal and legal interest due upon the loan from Madame *Cousineau.* But the payment by Judge *Mondelet* cannot be said to have been in respect of the Obligation of the 11th of November, 1845, but of the new Contract of 1855, to which the *Drummonds,* on whose account the money was paid, were parties. This being so, there was not even a taking of illegal interest upon the usurious Contract itself, and the case of the Appellant must have failed upon this ground.

After the execution of this Deed the amount due to the *Dorions,* which was expressly stated in it, could not fairly be disputed. It is clear that the *Drummonds* were bound by the arrangement thus

entered into, for the *Dorions* not only forbore to demand immediate payment of what was due to them, but relinquished a security which they held upon the lands of the *Drummonds* for their debt.

Their Lordships, therefore, are of opinion, that if the Appellant had proved a case of usury against the Respondents, there would have been a good defence to the action upon the grounds stated, and they will, therefore, humbly recommend to Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss the appeal with costs.

Solicitors for the Appellant: *Hensman & Nicholson.*
Solicitors for the Respondents: *Ashurst, Morris, & Co.*

THOMAS GIBLIN (EXECUTOR OF RICHARD LEWIS) . . . . . } APPELLANT;

AND

JOHN FRANKLIN McMULLEN . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Banker—Deposit by Customer for safe keeping—Gratuitous Bailees—Robbery by Servant of Bailees—Gross Negligence, meaning of term—Evidence—Non-suit.

In an action for damages against a Bank as Bailees for the negligent keeping of certain Railway Debentures placed in their care by a Customer, in the ordinary way of their business as Bankers, it appeared, that the Box containing such securities (of which the Customer kept the key) was kept in a strong room in the Bank, with the Boxes of other Customers, and specie and other securities belonging to the Bank. Access to this room was only obtained by passing through a compartment where a Cashier sat by day, and a Messenger slept at night. The strong room had two iron doors, which were opened by separate keys, which during the day were kept by the Cashier who occupied the compartment. One of the keys was kept at night by the Cashier of the Bank, and the other key by another Officer of the Bank. Beyond this strong room there were two other rooms, in the outer of the two, uncoined gold, and in the inner, bullion and unsigned notes were kept.

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* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER.

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The Manager of the Bank kept the key of the outer of these rooms, and one of the Directors of the Bank that of the inner. The owner of the Box had free access to the room where his Box was deposited during Banking-hours, in the presence of one of the Bank Clerks, when he had occasion to take out coupons from his Debentures, for collection. While in such custody the Cashier of the Bank abstracted the Debentures from the Box, and made away with them:—*Held*, that the Bank, as gratuitous Bailees, were not bound to exercise more than ordinary care of the deposits entrusted to them, and the negligence for which alone they would be made liable would have been, the want of that ordinary diligence which a reasonably prudent man takes of his own property of the like description.

The application of the term "gross negligence," in the case of gratuitous Bailees, considered and commented on.

At the close of the Plaintiff's case, the Defendant applied for a nonsuit, on the ground that the Bank, being gratuitous Bailees, there was no evidence given of such negligence as to render them liable. The Judge refused to stop the case, but reserved leave to move for a nonsuit. The jury found for the Plaintiff. The Defendant obtained a rule to set aside the verdict, and to enter a verdict for the Defendant, or for a judgment of nonsuit, and the Court made the rule absolute for a nonsuit:—*Held*, that such course was regular, as it was the duty of the Court to do what the Judge ought to have done at the Trial, when at the close of the Plaintiff's case there was no evidence upon which the jury could reasonably and properly find a verdict, as the Judge ought to have directed a nonsuit; and, as in every case before evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

THIS appeal was brought from a judgment of the Supreme Court of *Victoria* ordering a nonsuit to be entered in an action for damages, wherein *Richard Lewis*, deceased, was the Plaintiff, and the Respondent, representing the *Union Bank of Australia*, was the Defendant. The action was brought for negligence by the Bank, in not having safely kept and taken care of certain Railway Debentures belonging to the Plaintiff.

The declaration contained two counts, the first upon a bailment by *Richard Lewis* to the Bank of certain Railway Debentures to be safely kept by the Bank for *Lewis* for reward, and alleged that the Bank kept the Debentures in a negligent manner, whereby they were lost; the second, upon a similar bailment, without reward.

The Respondent pleaded to both counts. First, a general denial of the bailment; and, secondly, not guilty; upon which pleas the Appellant joined issue.

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The action was tried on the 7th and three subsequent days in November, 1866, by Sir *William Foster Stawell*, Knt., the Chief Justice of the Supreme Court, and a jury. Upon the close of the Plaintiff's evidence, the Defendant's Counsel applied for a nonsuit, on the ground, first, that there was no evidence that the Bankers were Bailees for hire; and, secondly, that there was no evidence that the Bank was guilty of negligence, but that the evidence shewed, that the Plaintiff himself contributed to the loss of the Debentures. The Court, however, directed the trial to proceed, leave being reserved to the Defendant to move for a nonsuit on all these points.

The material facts proved in evidence at the trial were, in substance, as follows. The Plaintiff, who was himself examined, resided in *Hobart Town*, and in the year 1857 opened an account with the *Melbourne Branch* of the *Union Bank*. Soon afterwards he deposited in the Bank a Box containing Deeds, Debentures, and securities of various kinds, he himself retaining possession of the key. No arrangement was made when the Box was first left in the Bank, or at any other time, as to its deposit or safe custody. Nor did the Bank receive any benefit for keeping this Box, or those of several other Customers. It was placed in a strong room in the underground story of the Building in which the Bank business was transacted. There were three doors to this room, and access to it by steps leading from a small compartment which was separated from the general Clerks' room by a partition about five feet high; in this compartment the Cashier sat during Bank hours. From it the outer door of wood opened on the steps. At the bottom there were two iron doors. At the time the Plaintiff deposited his Box the keys of these doors were kept at night, one by the Cashier, who also discharged the duties of Accountant, and one by another Officer of the Bank. The former alone had the custody of the key of the wooden door. A Messenger slept in the compartment close to the wooden door, and two Officers of the Bank in other parts of the building. During the day the Cashier had the keys of both iron doors. Beyond this strong room there were two other rooms, one inside the other, in the inner the bullion and unsigned notes of the Bank were kept, and in the outer uncoined gold previous to its transmission out of *Victoria*. A Director re-

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tained a key of the bullion room, and the Manager the key of the outer room. The way from this compartment out of the Building was either through the general Clerks' room, then through the public room of the Bank, and so to the public entrance door, or through a portion of the general Clerks' room, then by a passage past the Accountant's room, the Bill room, and the Manager's room, and so to another door into the street. Any person going out or coming in by either way during business hours must have been seen by the Clerks in their room, and most probably by others in other parts of the Bank building. In this strong room were placed the Customers' Boxes, between 300 and 400 in number, supposed to contain Deeds and securities, the keys of which were all of them retained by the Customers; the Manager's Box, Tellers' Boxes, and safes or Boxes of other Banks; of the last three the first contained Bills of Exchange for discount and collection to an amount varying from £1,500,000 to £2,500,000, the second, notes, gold, and silver coin to an amount of about £50,000, and the third specie and valuable property. Customers were allowed access to their Boxes during Bank hours whenever they pleased. They either went down to the strong room, or the Box required was brought up by a Messenger, accompanied by a Clerk, to the Accountant's or Cashier's room. The Boxes were opened, and the contents removed, or additions made to them, by the Customers in the presence of a Bank Clerk, who merely saw that each Customer went to his own Box, but did not attempt to observe what was done with the contents. The Plaintiff had put Debentures to a very large amount in his Box, the coupons of which he was in the habit of cutting off and placing in the Bank for collection; on some occasions he took the Box out of the Bank and brought it back, and on others the Debentures, and replaced them in the Box. In 1861, the Plaintiff took out of his Box, Debentures to an amount of about £12,000, then becoming due, and deposited them in the Bank for collection in the usual way. A receipt was given for them, and they were entered in the Bank Books. In January, 1862, the Plaintiff purchased Railway Debentures in value £10,450, and put them in his Box. Soon after he changed this for another Box. He caused the lock of the latter to be taken off, and a *Chubb's* lock with two keys to be substituted, and he transferred to

it all the contents of the first Box, retaining throughout the keys of this second, as he had done that of the first. For several years previous, and up to the 12th of April, 1864, a Clerk of the name of *Fletcher* discharged the duties of both Cashier and Accountant. On that day, another Clerk, *Thompson*, was appointed as acting Accountant, and thenceforward continuously he kept throughout the night a key of one iron door leading to the strong room, and *Fletcher*, as long as he remained in the Bank, kept the key of the other. No alteration was made in the custody of these keys during the day, the Cashier had both. The coupons of the Debentures last purchased by the Plaintiff became due in April and October, and he was in the habit of visiting *Melbourne* half yearly about these dates. On the 19th of April, 1864, being then in *Melbourne*, he took the last-mentioned Debentures out of his Box, carried them to his Hotel, cut off the coupons there, those to fall due in October, 1864, and also in April, 1865, replaced the Debentures, and deposited the coupons with the Cashier, *Fletcher*, for collection by the Bank, obtaining from him a receipt. On the 30th of April he also placed in his Box some gas shares, and soon after departed to *Tasmania*. In July, 1864, *Fletcher* obtained leave of absence and left the Bank. A short time before the present action was commenced, the Manager told the Plaintiff's Attorney, that whilst *Fletcher* was in the Bank, a person had asked respecting his character, stating that he had been informed by letter from a friend formerly residing in *Victoria*, but then in *England*, that this friend had not received from *Fletcher* moneys which he expected to have been remitted by him, and that he, the Manager, then said he had unbounded confidence in *Fletcher's* integrity, and that he had no doubt all would be right. *Fletcher* had been upwards of eight years in the service of the Bank. His character, with the exception of this single statement, had been good, and his conduct uniformly blameless. When he left, all securities, cash, &c., under his control, were examined and found correct, and all the Customers' Boxes, the number having been, from time to time, duly entered in a Book, were taken over by his successor, examined, and found, so far as the Bank knew, correct also. On *Fletcher* leaving, the office of Cashier was abolished, and the duties discharged by him were thenceforward performed by the Chief Teller, who, as well as the

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Accountant, had necessarily access during the day to the strong room in which the Teller's Boxes and loose silver were kept, and on this alteration having been made, directions were given that whenever it was necessary to visit the strong room, both these Officers should go together. In the end of June, or beginning of July, 1865, the Plaintiff came to *Melbourne*. Soon after his arrival he went to the Bank, was admitted into the strong room, opened his Box, and took out the gas shares deposited by him on the 30th of April, 1864. He did not then examine the Box further, and was not aware of the loss subsequently discovered. After he had taken out these shares, he submitted to the Manager a form of receipt for the Debentures (£10,450 worth), there being then in the Box other securities to the value of about £20,000. This receipt the Manager declined to sign on two grounds—it was not in the form of which the Bank approved, and the Debentures had not been delivered to the Bank; but he offered, as the Plaintiff resided in another Country, to receive the Debentures and give a receipt in the form adopted when such securities were forwarded by post. On or about the 4th of July, 1865, and before anything further was done respecting this receipt, the Plaintiff again visited the Bank, had his Box brought up to the Accountant's room, opened it, and missed the Debentures. Inquiries were instituted, and it was discovered that *Fletcher* had sold, through a Broker in *Melbourne*, some of them to an amount of about £2,500, and received the money. At the time of the sale, two coupons not then due had been cut off. The precise mode in which these Debentures were abstracted was not proved; there was no doubt *Fletcher* was the thief, and that the theft must have been committed between the 19th of April and the end of July, 1864, and to effect it either the lock of the Plaintiff's Box must have been opened, or, although soldered to the Box inside, the lock itself must have been removed, a false key made, and the lock replaced; the solder, when the Box was first produced in Court, appearing perfect and as if it had not been moved. During the trial the lock was, at the request of the jury, taken off, and presented marks of previous violence, caused apparently by endeavours to remove it from the Box. Whether those endeavours were successful or not did not appear. After this loss was discovered the Teller's boxes were removed to the

room in which uncoined gold was kept, and of which the Manager had the key. No other change was made. These facts the Plaintiff contended upon the trial entitled him to a verdict. He urged specially, that even gratuitous Bailees must use the skill they possess, that by the change made subsequent to the discovery of the loss the Bank evinced they possessed requisite skill, or no change would have been made, yet that skill was not exercised until too late. Moreover, that the Plaintiff might properly claim a higher degree of care from a Bank, whose special business it was to receive valuable securities, than from any private individual who might have acted as Bailee.

Upon this evidence, the jury found a verdict for the Defendant upon the first count, and for the Plaintiff on the second count, with £10,450 damages, leave being reserved to move to set aside the verdict for the Plaintiff upon the second count, and to enter a verdict for the Defendant, or a judgment of nonsuit.

A rule was obtained and argued before the full Court, which was afterwards made absolute, and judgment subsequently given on the 18th of May, 1867, when the Chief Justice, on behalf of the Court, after stating the summary of the evidence as above set forth, proceeded in these terms:—

"In considering the arguments urged it is necessary to observe the distinction between the several kinds of bailment, and to avoid the commingling the duties of one with those which properly appertain to another kind. Bailees, whether gratuitous or not, may be answerable as mandatories, and yet they may not be accountable if they were depositaries merely. In the one instance they undertake to perform some act in relation to the article bailed, and if such performance involve skill they are bound to use all they possess. In the other they are passive, not active. A prudent person not possessed of skill can adopt the precautions necessary to protect property. Depositaries are custodians merely. As nothing active is to be done by them, no skill can properly speaking be applied. The necessity for its exercise does not arise. The nature of the bailment depends upon the agreement expressed or implied between the parties, and the duties of the Bailee depend on the class within which the particular bailment should properly be placed. Depositaries though gratuitous are bound to take at least

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the same care of the article bailed as they would of their own goods of a similar kind. Enjoying any special means of protection they should extend that protection to goods entrusted to them. Thus if they happen to be Bankers and possess a strong room, with several doors and locks, they ought to place goods deposited with them in that room, and be assured that the doors were securely locked. But they are not bound to do more, or to exercise greater care in other respects, merely because they happen to be Bankers, than the nature of the bailment would have required from any other person. To demand more at their hands would, in effect, be to alter the nature of the bailment, as the occupation or business of the person who was Bailee may have changed, and so make the division in which the bailment should be classed depend on an accidental circumstance forming no part of the agreement between the parties. The Plaintiff's reasoning, if followed out, would, in our opinion, break down all the well-known distinctions between *depositum* and *mandatum*. Nor can we, apart from evidence of actual negligence, recognise the mere change in the management of the affairs of the Bank subsequent to the loss as proof of anything more than that the management was susceptible of improvement. Without abandoning these arguments, the Plaintiff also urged that negligence was a matter of fact for a jury, and that as they had found the Bank had exhibited gross negligence the Court would not take it upon itself to decide the contrary. The question in this, as in other actions for negligence, is whether there was evidence to sustain the breach. Negligence is a negative not a positive term, it involves the non-performance of a duty; and that duty, though affected by the special facts of the case, must be defined by the Court. The nature of the duty varies with the existence or absence of reward. That of gratuitous Bailees is very different from that of Bailees for hire; the distinction between these several kinds of duty is a legal one, determined or determinable by recognised principles. If a jury, not the Court, are to decide on the distinction, it would depend on matters of fact, not on known principles of law; and if the Court must decide on some, we think, as put during the argument, they must decide on all such questions. The defining the duty, too, necessarily involves the deciding on the sufficiency of the evidence to go to a jury. For if

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the Court, having defined the duty, is of opinion that there is no evidence of a breach of that duty, the Plaintiff should be nonsuited, unless actions for negligence are to be tried in a mode different from all others. There may be evidence of negligence, but that is not sufficient, there must be evidence of actionable negligence, of a breach of the duty imposed on the Defendant. It is not disputed, that if there is any evidence for the jury, they constitute the proper Tribunal to decide thereon. There are doubtless some observations in *Doorman* v. *Jenkins* (1) on which the Plaintiff relied, as tending to shew that the question of negligence is for the jury. But in that case there was, in the opinion of the Court, evidence of gross negligence, it was unnecessary, therefore, to pronounce decisively on the point for which the case is now cited; and some of the learned Judges abstain in marked terms from expressing any decided opinion on an extra-judicial question. Before and since that decision there have been numerous cases in which Plaintiffs have been nonsuited on the grounds of the insufficiency of the evidence adduced: *Finucane* v. *Small* (2); *Assop* v. *Yates* (3); *Cornman* v. *The Eastern Counties Railway Company* (4); *Cotton* v. *Wood* (5); *Hammack* v. *White* (6); *Cox* v. *Burbidge* (7); *Harris* v. *Anderson* (8); and *Crafter* v. *The Metropolitan Railway Company* (9). Of these, perhaps the last is the strongest in support of the Defendant's view, as in it two witnesses gave evidence that brass nosings to steps and the absence of handrails, which constituted the negligence complained of, were attended with danger; and yet, though no witnesses were called for the Defendant, and there were none to contradict those for the Plaintiff, the evidence was held insufficient. In the case of *The Hélène* (10), recently decided by the Privy Council, the principle is recognised, that the Plaintiff must give satisfactory proof of negligence. One other objection urged by the Plaintiff deserves to be considered, namely, that the communication made by the Manager to the Plaintiff's Attorney afforded grounds from which a jury might legitimately have inferred that the Bank was culpable in not insti-

(1) 2 Ad. & E. 256.
(2) 1 Esp. 315.
(3) 2 H. & N. 768.
(4) 4 Ibid. 781.
(5) 8 C. B. (N.S.) 568.
(6) 11 C. B. (N.S.) 588.
(7) 13 Ibid. 430.
(8) 14 Ibid. 499.
(9) Law Rep. 1 C. P. 300.
(10) Ibid. 1 P. C. 231.

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tuting inquiries respecting *Fletcher's* character. The mode in which the communication was made, and the period for which *Fletcher* had then faithfully served the Bank, are subjects for a jury, but the report or complaint was, in our opinion, vague and indistinct. The bearer of it himself indirectly solicited the advice of the Bank on the subject, asking them to give their opinion as to *Fletcher's* integrity. In fact, information as to character was asked of, not given to the Bank. Fully conceding the responsibility of employers for the acts of servants known to be dishonest and yet still retained, we think this was merely a rumour which did not necessitate investigation at the hands of the Bank, or so put them on inquiry as to render them culpable if it were omitted. We think the Bank were merely depositaries of this Box, and that they had control only of it, the Plaintiff himself retaining control of the contents. The fact of his demanding a receipt for these Debentures is, to our minds, conclusive that he was himself satisfied that the Box only, and not the contents, was deposited, and that there existed a necessity for further security as regards some at least of those contents. Without deciding that from an accidental inspection by one of its Officers the Bank are to be affected with knowledge of the varying contents of a Box to which they had not access, we think that they discharged the only duty that knowledge would have imposed on them, by placing the Box containing these securities in the same rooms they did other securities of a similar kind belonging to the Bank. These Railway Debentures are stated to be transferable by delivery, but sales of them are usually effected through Brokers, and we cannot class them, as regards the degree of care required from depositaries, in the same category with the specie or bullion of a Bank. The declaration states, that the Box was taken to be safely kept. Admitting the distinction between an article taken to be kept and taken to be safely kept, there is no evidence of the taking as alleged, the Box was not deposited or received on those terms. The duty of the Bank was, in our opinion, to receive the Box and place it in their strong room. In the absence of all proof of negligence, they were not required to alter their course of management, or establish a system of supposed checks by means of one Clerk acting with another. If the Plaintiff needed greater security he was well aware

that according to the proper and business course he should have deposited these Debentures not in his own Box but in the Bank. They would then have been duly entered in the Bank Books, a lien for any debt due by the Plaintiff would have been given to the Bank, and the responsibility thereby imposed would have been exacted. He had taken this course on a previous occasion; he deemed it expedient not to continue to do so. He took the risk upon himself, and must abide the consequences. Had the Debentures been deposited and entered in the Bank Books in the regular way, the certainty of any irregularity being detected would have afforded the best security. *Fletcher* returned all the property the loss of which would have been at once discovered, and abstracted only that of which no entry was made, and respecting which the Plaintiff had himself very clearly intimated his intention of not opening the Box for a period of eighteen months. Loss by private theft, it is said by some Authors, affords evidence of ordinary negligence. Even conceding this to be correct, evidence of ordinary neglect merely is insufficient to sustain this action. We think there is no evidence of actionable negligence, and that the Bank are not answerable at law for the abstraction by *Fletcher* of the contents of the Box. We think that the law is correctly stated in *Addison* on Contracts, p. 406 [6th Edit., by *Cave*]. The applicability of the passage to the present case justifies its being quoted: 'It is the custom of Bankers to receive and keep for the accommodation of their Customers Boxes of plate and jewels, Wills, Deeds and securities; and as no charge is made for the keeping of these things, they are gratuitous deposits, the Bankers, therefore, are only bound to take ordinary care of them, and if they are stolen by a Clerk or servant employed about the Bank, the Bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant.' The Defendant is, in our opinion, entitled to a verdict; but as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule will be absolute accordingly."

The appeal was from this judgment of nonsuit. Before the hearing the Plaintiff, *Lewis*, died, and the appeal was revived by the Appellant, his Executor.

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The *Solicitor-General* (Sir *J. D. Coleridge*, Q.C.), Mr. *Watkin Williams*, and Mr. *Beresford*, for the Appellant:—

The evidence given at the trial was sufficient to support the verdict of the jury. Though the Bank were only gratuitous Bailees, they are responsible for gross negligence. What constitutes gross negligence is a question of the degree of negligence, and is one of fact for the jury to determine: *Doorman* v. *Jenkins* (1); *Shiells* v. *Blackburne* (2). The finding, therefore, of the jury upon the fact of negligence ought not to have been disturbed. The liability of Bailees depends on the fact, whether they have taken such precautions as they were bound to do for the protection of the property entrusted to their custody. The amount of care requisite is one entirely for the jury. Now, here it is manifest that no proper care was taken of the Appellant's securities. The Bank permitted *Fletcher*, their servant, to keep both the keys of the strong room, and to have free access to the room at any time without the control of any one. That was gross negligence on their part, and they in fact admitted as much, for after the robbery was discovered, the Bank for the first time adopted the additional precaution of sending two Clerks with a Customer into the strong room. A good deal of confusion formerly arose from the use of the term "gross" as applied to the negligence of a Bailee and what was sufficient negligence to found an action; but in *Wilson* v. *Brett* (3) Mr. Baron *Rolfe* observes, that there is no difference between negligence and "gross negligence," which he said "was the same thing with the addition of a vituperative epithet." The same view was taken by the Exchequer Chamber in *Beal* v. *The South Devon Railway Company* (4), and in *Grill* v. *The General Iron Screw Collier Company* (5) Mr. Justice *Willes* expressly recognised Mr. Baron *Rolfe's* definition of gross negligence, being "ordinary negligence with a vituperative epithet." The Bank was liable as Bailees by reason of negligence in not taking due care of the Box entrusted to their care: *Grill* v. *The General Iron Screw Collier Company* (5); *Dansey* v. *Richardson* (6); *Beal* v. *The*

(1) 2 A. & E. 256.
(2) 1 H. Bl. 158.
(3) 11 M. & W. 115.
(4) 3 H. & C. 337.
(5) Law Rep. 1 C. P. 612.
(6) 3 E. & B. 144.

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South Devon Railway Company (1); *The Peninsular and Oriental Steam Navigation Company* v. *Shand* (2).

Secondly, the rule for a nonsuit ought not to have been made absolute, as it was not competent to the Court to give judgment of nonsuit after the Defendant had gone into evidence. [LORD CHELMSFORD:—Is it not competent for the Court to adopt the alternative of entering a nonsuit or a new trial?] All the Court could do was to direct a new trial on the question of negligence, and limited to the terms on which the rule was granted. The rule ought to have been discharged, and the Appellants declared entitled to judgment for the amount of the damages found by the jury.

Mr. *Mellish*, Q.C., Mr. *J. Brown*, Q.C. (Mr. *J. D. Wood* and Mr. *W. Murray* with them), for the Respondent:—

If this appeal is allowed it will cause the greatest consternation among Bankers, as well in *England* as in the Colonies. The universal practice has been for Bankers to allow Customers to deposit their securities with them for care, the Bankers acting as gratuitous Bailees; but if this appeal succeeds, no Banker will in future give any such accommodation to their Customers. Now, in this case there was no bailment of the Debentures in the terms alleged in the second count of the declaration, nor was there sufficient evidence to shew that the Bank kept the Debentures in such a negligent manner as alleged in that count. The only evidence is to the effect, that *Fletcher*, the second Officer of the Bank, was allowed to have access at any time of the day alone to the strong room, but there was no evidence given of the practice of Bankers in *Melbourne* or elsewhere to shew that in that respect there was negligence on the Bank's part. Other Customers as well as the Plaintiff had daily access to their Boxes in the strong room, and it would be absurd to say that the Directors were themselves always to keep the key of the strong room. Though the Debentures were stolen by *Fletcher* from the Bank whilst in their custody, the Bank would not be liable for the loss without gross negligence, and there was no evidence of such negligence on their part: *Story* on Bailments, §§ 63, 64 (7th Ed.) *Coggs* v. *Bernard* (3), which is the leading case,

(1) 3 H. & C. 337.
(2) 3 Moore's P. C. Cases (N.S.) 272.
(3) Ld. Raym. 909; and see note to Smith's L. C. p. 99 [2nd Edit.]

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and in which the different kinds of bailment are defined, was like the present case, one of gratuitous bailment. Lord *Holt* there lays it down (1) that, where a man takes goods in his custody to keep for the use of the Bailor, the Bailee is not answerable if they are stolen without any fault of his, neither will common neglect make him chargeable, but he must be guilty of some gross neglect; and again (2) he says, a Bailee is not chargeable without an apparent gross neglect, and if there be such neglect it is looked upon as an evidence of fraud. It is clear that Lord *Holt* meant by the adjective "gross," wilful negligence. Having regard to this case, *Doorman* v. *Jenkins* (3) cannot be supported. There, in assumpsit against a Bailee, it was proved, that the Defendant, having custody of money without reward, lost it, and made the following statement:—That he had unfortunately put it, with a larger sum of money of his own, into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a Sunday, but the rest of the house, which was inhabited, was not open on a Sunday; and that the cash-box, with his own and the Plaintiff's money, had been stolen on that day. The Judge left it to the jury whether the Defendant was guilty of gross negligence; and he told them that the loss of the Defendant's own money did not necessarily prove reasonable care. Mr. Justice *Taunton* there says, the phrase "gross negligence" means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree (4), and he properly considered that, in some cases, the question of gross negligence was a matter of law, but Lord *Denman* was of opinion (5), that it was a proper question to be left to the jury, as it was impossible for a Judge to take upon himself to say whether negligence is gross or not. In *Finucane* v. *Small* (6) it was held, that where goods are bailed to be kept for hire, the Bailee is bound to take the same care of them as he would of his own, and, therefore, if they were stolen by the Bailee's servant without gross negligence on his part the Bailee was not liable. *Foster* v. *The Essex Bank* (7), decided by the Supreme Judicial Court

(1) Ld. Raym. 913.
(2) Ibid. 915.
(3) 2 A. & E. 256.
(4) 2 A. & E. 261.
(5) Ibid. 265.
(6) 1 Esp. 315.
(7) 17 Massachusetts Reps. 478.

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of *Massachusetts*, is a direct authority in our favour, and in its important features resembles the present case. In that case, a cask containing a quantity of gold coin was deposited in a Bank for safe-keeping, and the gold was fraudulently taken out by the Cashier of the Bank, and it was held, that the Bank was not liable to the Depositor for the value of the gold so taken. It was further held, that a mere Depositary, without any special undertaking, and without reward, is not answerable for the goods deposited, only in cases of gross negligence, which is equivalent to fraud in its effects upon contracts, and that even a Bailee for hire or reward is not liable if the goods are stolen, if he shews that he used due care in the keeping of them.

It is settled law now, that unless there be reasonable evidence of negligence to lay before the jury, the Judge ought so to direct the jury, and the case to be withdrawn; a mere scintilla of evidence will not do: *Cotton* v. *Wood* (1); *Toomey* v. *The London, Brighton, and South Coast Railway Company* (2); *Cornman* v. *The Eastern Counties Railway Company* (3). The importance of these cases is, that it shews that the Judge takes notice of the evidence as to negligence, and not as Lord *Denman* ruled in *Doorman* v. *Jenkins* (4), which case is overruled by *Crafter* v. *The Metropolitan Railway Company* (5). [LORD CHELMSFORD:—The rule in respect to the province of Judge and jury is correctly laid down in *Ryder* v. *Wombwell* (6). In that case, to a plea of infancy in an action for goods supplied, the Plaintiff replied, that they were necessaries, and it was held that the question of "necessaries" or not "necessaries" was one of fact, and, therefore, for the jury, but, like all other questions of fact, it should not be left to the jury by the Judge unless there is evidence on which the jury can reasonably find in the affirmative.] Although that was an action for necessaries, the principles enunciated in that case apply to the present.

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Feb 29.

The consideration of their Lordships' judgment having been reserved was now delivered by

LORD CHELMSFORD:—

This is an appeal from a judgment of nonsuit of the Supreme

(1) 8 C. B. (N.S.) 568. 7 Jun 1868
(2) 3 C. B. (N.S.) 146.
(3) 4 H. & N. 781.
(4) 2 A. & E. 265.
(5) Law Rep. 1 C. P. 300. 12 Jun 1872
(6) Ibid. 4 Ex. 32.

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Court of the Colony of *Victoria* in an action by the Appellant's Testator against the Respondent.

The action was brought against the Defendant as Inspector of the *Union Bank of Australia*, to recover damages for the negligent keeping of certain Railway Debentures delivered to the Bank to be safely kept and taken care of.

The Plaintiff, who resided at *Hobart Town*, in *Tasmania*, had an account with the *Union Bank of Australia* from the year 1857.

From the earliest period of his becoming a Customer of the Bank he had placed in their care a Box, of which he kept the key, containing Securities, Deeds, and Debentures. The Bank received no consideration for taking care of the deposits of their Customers. In the month of January, 1862, the Plaintiff purchased the Railway Debentures in question and put them in his Box. The Box appears always to have been kept in a strong room underground, in which the Boxes of other customers of the Bank were placed. There were also in this strong room the Manager's Box, containing Bills for discount and collection, worth from £1,500,000 to £2,500,000, Teller's Boxes, worth £50,000, and securities of the *Royal*, *Central*, and *Agra Banks*, in which the *Union Bank* was interested. The access to this room could only be obtained by passing through a compartment of the Office which was separated from the part where the Clerks were employed by a partition about five feet high. In this compartment *Fletcher*, the Cashier, always sat during Bank hours, and a Messenger slept there during the night. There was a wooden door in this compartment which opened upon a flight of steps leading to the room where the Plaintiff's Box was deposited. This room had two iron doors, which were opened by separate keys. *Fletcher* always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the Debentures in question were placed in the Box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another Officer of the Bank. Beyond the room where the Box was there were two other rooms; in the outer of the two uncoined gold was kept, in the inner, bullion and unsigned notes of the Bank. The Manager kept the key of the outer of these two rooms, and one of the Directors of the Bank that of the inner one.

The Plaintiff had frequent opportunities of seeing how and where his Box with the Debentures was kept. The Customers were permitted to have access to their boxes during the Bank hours, but always in the presence of a Bank Clerk. The Plaintiff occasionally went down to the strong room to take the coupons from his Debentures for collection, but generally the Box was brought up to him. The coupons when taken from the Debentures were always given by the Plaintiff to *Fletcher* to collect for him.

On the 19th of April, 1864, the Plaintiff went to the Bank and asked for his Box. *Fletcher* brought it to him. The Plaintiff opened the Box, took out his Debentures, and carried them away. He then cut off the coupons, took back the Debentures, replaced them in the Box, locked it, and gave the coupons to *Fletcher* to collect for him as usual. Before the Plaintiff's next visit to the Bank, *Fletcher* had abstracted the Debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July, 1864, as *Fletcher* then left the Bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The Plaintiff did not come again to the Bank till the 3rd of July, 1865. He then went into the strong room and took out of his Box some gas shares. On the following day he returned to the Bank and had his Box brought up to him, when he discovered that the Debentures were gone.

All the material facts above stated were proved in the course of the Plaintiff's case; that the Bank were gratuitous Bailees; that the Plaintiff had known for years the manner in which the Bank kept the property of their Customers deposited with them, and the means which they employed for its protection, and that the Debentures were dishonestly taken away by *Fletcher*.

At the close of the Plaintiff's case, the Counsel for the Defendant applied for a nonsuit on the ground, that the Bank being gratuitous Bailees no evidence had been given of such negligence as would render them liable for the loss of the Debentures. The Judge refused to stop the case, but reserved leave to the Defendant to move to enter a nonsuit. The Defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the Plaintiff's witnesses

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were the keeping in the strong room in which the Plaintiff's Box with the Debentures was placed, not only of the Boxes of other Customers, but also of the before-mentioned valuable property belonging to the Bank; the good character of *Fletcher*, and his leaving the Bank in the end of the month of July, 1864; and that after *Fletcher* left, but before the loss of the Plaintiff's Debentures was discovered, a rule was made in the Bank that two Clerks instead of one (as formerly) should go with a Customer wishing to examine his Box in the strong room. The jury found a verdict for the Plaintiff upon an issue as to the delivery of the Debentures to be kept by the Bank without reward, and also upon the plea of not guilty (which raised the question of negligence), and they assessed the damages at £10,450.

The Defendant, upon the leave reserved at the trial, moved for, and obtained, a rule from the Supreme Court to set aside the verdict and to enter a verdict for the Defendant, or a judgment of nonsuit. That rule was afterwards made absolute, the Chief Justice stating that "in the opinion of the Court the Defendant was entitled to a verdict, but that as at the Trial, when leave to enter a verdict was reserved, there was an understanding that the rule, if absolute, should be for a nonsuit, and not to enter a verdict, the rule will be absolute accordingly." In the argument of the appeal, the Counsel for the Appellant, admitting that the Bank were gratuitous Bailees, and, therefore, not responsible except for the highest degree of negligence usually styled "gross negligence," insisted, that it was a question of fact for the jury, whether the Bank had been guilty of this species of negligence, and that the Judge would not have been justified at the close of the Plaintiff's case in withdrawing the question from the jury and directing a nonsuit, and that after the Defendant's case had been gone into, and the jury had pronounced a verdict upon all the evidence on both sides, it was not competent to the Court to give a judgment of nonsuit, or to do more than to direct a new trial upon the question of negligence. The learned Counsel contended, that the Bank had been guilty of negligence, because there being two iron doors with protecting locks to the strong room where the Plaintiff's Debentures were, the Cashier was permitted to keep both keys. And they urged that the Bank by their own act admitted that

they had not been sufficiently careful, as after *Fletcher* left, they made a rule that two Clerks should always accompany the Customers to the strong room instead of only one, as had previously been the practice.

The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered.

It was the duty of the Court to do what the Judge ought to have done at the Trial; and if, at the close of the Plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to have directed a nonsuit.

Formerly it used to be held, that if there were what was called a scintilla of evidence in support of a case the Judge was bound to leave it to the jury. But a course of recent decisions (most of which are referred to in the case of *Ryder* v. *Wombwell* (1)) has established a more reasonable rule, viz., that in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

If, therefore, the Plaintiff's evidence in this case was such that the Judge ought to have considered that it fell short of proving the Bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit.

But the Appellant's Counsel insisted, that as the Defendant at the Trial did not rest upon his objection to the sufficiency of the Plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he proved any facts which were favourable to the Plaintiff, they might be used in answer to the application to the Court for a nonsuit, upon the leave reserved at the close of the Plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the Counsel for the Respondent agreed that the Appellant's Counsel might be at liberty to use in argument any facts which they could extract from the Defendant's evidence in support of their case.

(1) Law Rep. 4 Ex. 32.

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But it may be convenient to see how the Plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the Defendant's witnesses.

Did the Plaintiff, then, give any evidence of the Bank having been guilty of that degree of negligence which renders a gratuitous Bailee liable for the loss of property deposited with him?

From the time of Lord *Holt's* celebrated judgment in *Coggs* v. *Bernard* (1), in which he classified and distinguished the different degrees of negligence for which the different kinds of Bailees are answerable, the negligence which must be established against a gratuitous Bailee has been called "gross negligence." This term had been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a Bailee of this class. At last, Lord *Cranworth* (then Baron *Rolfe*), in the case of *Wilson* v. *Brett* (2), objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent Judges.

Of course, if intended as a definition, the expression "gross negligence" wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of Bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord *Holt*, and Sir *William Jones* in his Essay on the Law of Bailments.

In the case of *Grill* v. *General Iron Screw Collier Company* (3), Mr. Justice *Willes*, after agreeing with the *dictum* of Lord *Cranworth*, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal* v. *The South Devon Railway Company* (4), said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the Defendant to use." It is hardly correct to say, that the Court of Exchequer Chamber in the case referred to adopted the view of Lord

(1) Ld. Raym. 909.
(2) 11 M. & W. 113.
(3) Law Rep. 1 C. P. 612.
(4) 3 H. & C. 337.

Cranworth as to the impropriety of the term "gross negligence." Mr. Justice *Crompton*, in delivering the opinion of the Court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and, he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence." Mr. Justice *Montague Smith*, in the case in which the above-mentioned observations of Mr. Justice *Willes* were made, said, "The use of the term 'gross negligence' is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous Bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord *Holt*, a gratuitous Bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a Bailee must exercise corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility.

In truth, this difficulty is inherent in the nature of the subject, and though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the Judge to distinguish, as well as they can, degrees of things which run more or less into each other.

It is clear, according to the authorities, that the Bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary dili-

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gence which men of common prudence generally exercise about their own affairs.

The case resembles very closely one that was mentioned by the Counsel for the Respondent, which was decided in the Supreme Judicial Court of *Massachusetts*, the case of *Foster et al., Executors*, v. *The Essex Bank* (1). The Plaintiff in that case deposited with the Bank, for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the Bank, and the Agent of the Plaintiff was in the habit of coming to the Bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the Plaintiff gave orders to the Bank (which he frequently did) to deliver some of the gold doubloons deposited, the cask was opened by the Cashier or Chief Clerk, who delivered the doubloons pursuant to the orders. The Cashier and Chief Clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The Court, after argument, gave judgment for the Defendants. The Chief Justice, who delivered the opinion of the Court, entered fully into the law of bailments applicable to the case, holding that "as far as the Bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor and without any advantage to the Bank which could tend to increase its liability beyond the effect of such a contract." "That the Bank was answerable only for gross negligence or for fraud, which will make a Bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the Plaintiff's property as of other deposits, and of the property belonging to the Bank itself." And the Court held, that the Bank was not responsible for the fraud or felony of the Cashier and Clerk, as when they abstracted the Plaintiff's gold from the cask they were not acting within the scope of their employment; "and the Bank was no more answerable for their act than it would have been if they had stolen the Pocket-book of any person who might have laid it upon the desk while he was transacting some business at the Bank."

(1) 17 Massachusetts Reps., 478.

Their Lordships entertain no doubt that it was the duty of the Judge at the close of the Plaintiff's case, upon the application of the Counsel for the Defendant, to have ordered a nonsuit, or if the Plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the Defendant, as there was an entire failure of evidence of the want of that ordinary care which the Bank was bound to bestow upon the Plaintiff's deposit.

But the Judge having refused to nonsuit, the Defendant thereupon went into his case and called witnesses, and having done so the Counsel for the Appellant contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the Judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the Judge could not have nonsuited the Plaintiff after the Defendant had entered upon his case, as it was decided in the case of *Davis* v. *Hardy* (1), that the evidence given by a Defendant may be used for the purpose of a nonsuit.

The Defendant's evidence added to the Plaintiff's case the important fact, that in the strong room in which the Plaintiff's Debentures were kept there were, besides the Boxes of other customers, Bills, Securities, and specie, the property of the Bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous Bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no case which puts the duty of a Bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in *Doorman* v. *Jenkins* (2), where Lord *Denman* told them that "it did not follow from the Defendant's having lost his own money at the same time as the Plaintiff's, that he had taken such care of the Plaintiff's money as a reasonable man would ordinarily take of his own, and, he added, that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence."

(1) 6 B. & C. 225. (2) 2 A. & E. 258.

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No one can fairly say, that the means employed for the protection of the property of the Bank, and of the Plaintiff, were not such as any reasonable man might properly have considered amply sufficient. But the Appellant's Counsel insisted that the fact appearing for the first time in the Defendant's case, that the Bank, after *Fletcher* had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depository does not multiply his precautions, so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence.

Their Lordships are clearly of opinion, that the Plaintiff failed upon his own evidence to prove a case of negligence against the Bank, and that the evidence produced by the Defendant shewed more strongly the absence of any such negligence for which the Bank would have been liable. They will, therefore, recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Solicitors for the Appellants: *Davidson, Carr, & Bannister.*
Solicitors for the Respondents: *Murray & Hutchins.*

LAURENCE McDERMOTT . . . . . APPELLANT;

AND

THE HON. JOSEPH BEAUMONT, CHIEF JUSTICE OF THE SUPREME COURT OF BRITISH GUIANA, AND THE HON. ROBERT CROSBY BEETE, FIRST PUISNE JUDGE . . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CIVIL JUSTICE OF BRITISH GUIANA.

Contempt—Commitment by Colonial Court—Jurisdiction—Appeal to Queen in Council.

Leave having been given by the Judicial Committee (on an *ex parte* application) to appeal to Her Majesty in Council, against an Order of commitment for contempt, and a judgment refusing leave to appeal from such Order, made by the Supreme Court of Civil Justice of *British Guiana;* without prejudice to the question of the competency of Her Majesty to entertain an appeal from an Order of commitment made by a Court of Record inflicting punishment by fine or imprisonment for contempt; the Appellant objected, *inter alia,* that the Supreme Court of Civil Justice in *British Guiana* was not a Court of Record, and had no such power of committing as had been exercised. The Judicial Committee, considering the question of jurisdiction a preliminary question, limited the argument to that point: and upon a review of the Orders in Council and Ordinances establishing the Civil and Criminal Courts in *British Guiana* was of opinion, (1) that the Supreme Court of Civil Justice of that Colony was constituted a Court of Record, and had power to commit for contempt, and (2) that the exercise of such a power being discretionary was not the subject of appeal, and that the leave given therefore ought not to have been granted.

IN this case the appeal was, by special leave (1), brought from an Order of the Supreme Court of Civil Justice of *British Guiana,* dated the 13th of April, 1866, whereby it was adjudged that the Appellant had committed a contempt of that Court, and it was ordered, that for such contempt the Appellant be imprisoned for the term of six months, or until he should be sooner discharged by the further Order of the Court. The contempt of Court, in respect of which such Order was made, consisted of the publication by the

(1) See case reported *nom. In re McDermott,* Law Rep. 1 P. C. 260.

* *Present:*—LORD CHELMSFORD, THE LORD JUSTICE WOOD, SIR JAMES WILLIAM COLVILE, and SIR EDWARD VAUGHAN WILLIAMS.

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Appellant, of two articles in a Newspaper, published at *George Town, Demerara*, called the "*Colonist*," on the 29th of March, 1866, and the 5th of April, 1866, respectively.

On the 2nd of April, 1866, the Appellant was, by an Order signed by the Chief Justice of the Court, summoned personally to attend the Court on the 4th, to shew cause why an attachment should not issue against him for the contempt of Court by the publication of the article of the 29th of March, 1866.

On the 4th of April, 1866, the Appellant, in pursuance of the above Order, personally attended the Court, when it was further ordered by the Court, that he should attend the Court at its sitting on the Friday then next (the 6th), there to answer in respect of the contempt alleged against him. On that day the Appellant again appeared, in pursuance of the last-mentioned Order of the 4th, and Counsel shewed cause on his behalf, when the Court, taking notice that since the 4th, namely, on the 5th of April, the Appellant had committed a further contempt of Court, by the publication of the article of that date in the "*Colonist*" Newspaper, it was ordered by the Court, that the Appellant should attend the Court at its sittings on Tuesday then next, the 10th, and should then further answer, as well for the contempt alleged against him in the aforesaid Orders mentioned, as for such further contempt as was then alleged in respect of the article published on the 5th of April. On the 10th the Appellant appeared personally in Court, in obedience to the Order of the Court made on the 6th of April. Being called on to shew cause, the Appellant's Counsel objected and declined so to do, alleging that such Order was irregular and ought not to be proceeded on, but that the Court ought, without reference thereto, to adjudicate on and dispose of the matters alleged against the Appellant, and as to which he was called on to shew cause by the before-mentioned Orders of the 2nd and 4th of April. The Court having considered the objection, overruled it, and held that the Order of the 6th of April was regular, and that the Appellant was bound to shew cause as thereby directed; and further, his Counsel objected to the Order being proceeded upon, inasmuch as it was pronounced *ore tenus*, and no minute or written copy had been served upon him, but the Court held that the Appellant having been present

personally and by his Counsel in Court when such Order was made, that it was not necessary to serve him with any minute or copy thereof; and intimated, that if he or his Counsel desired to be further advised of the same, or the terms or effect thereof, the Court would allow a further time to shew cause thereunder. The Appellant's Counsel having, in the circumstances, declined to shew cause, Mr. *Ross*, as the Informant of the Court in the matter, was heard in answer to what was alleged on behalf of the Appellant on the 6th of April. The Appellant's Counsel declined to reply, whereupon the Court reserved its decision until the Friday then next, the 13th of April, and ordered the Appellant to appear personally at the sitting of the Court on that day, intimating that notwithstanding his previous refusal to shew cause, they would allow him to do so before pronouncing their decision.

On the 13th of April, the Court asked the Appellant's Counsel whether he desired to shew cause in the matter, when, considering the whole proceeding irregular and illegal, he declined, whereupon the Court adjudged and determined that the Appellant had committed a high contempt of the Court by having printed and published in the "*Colonist*" Newspaper of the 29th of March, and 5th of April, the articles before mentioned, such articles respectively "containing divers matters scandalously reflecting upon His Honour *James Crosby*, one of the Judges of the Court, and unjustly reflecting upon Mr. *Ross*, the Informant of the Court, therein tending to defame and obstruct the administration of justice," and ordered that for such contempts the Appellant be imprisoned for the term of six calendar months, to be computed from the date of the Order (13th of April, 1866), or until he should be sooner discharged by the further Order of the Court. The Appellant was thereupon delivered into the custody of the Keeper of Her Majesty's gaol at *George Town*, under a warrant of commitment, dated the 13th of April, 1866. He afterwards, on the 14th of April, petitioned the Court for leave to appeal to Her Majesty in Her Privy Council from the Order. The Court, however, on the 4th of May, 1866, refused to grant leave.

In consequence, the Appellant, on the 21st of October, 1866, presented a petition to Her Majesty in Council, praying for leave to appeal against the Order of the 13th of April, 1866, and also the

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judgment of the 4th of May, 1866, refusing leave to appeal. The Judicial Committee on the hearing of the petition on the 3rd of November, 1866, reported as their opinion, that leave ought to be granted to the Appellant to enter into and prosecute his appeal against the Order of the 13th of April, 1866, and from the judgment of the Court of the 4th of May, 1866, without prejudice to the question of the competency of Her Majesty in Council to entertain an appeal from an Order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court, which question was to be open to argument on the hearing of the appeal; and that a copy of the Order in Council ought to be served on the Judges of the Supreme Court of *British Guiana*, with leave to put in their answer to the appeal. By an Order in Council, Her Majesty was pleased to approve of such Report, and to order as therein recommended.

A copy of the Order in Council was served on the Judges of the Supreme Court, who considered, as recorded on a minute of the Court, that they ought not to appear or act as Respondents in the matter, unless the Lords of Her Majesty's Council should deem it fit and desirable they should do so, for the better and more effectual elucidation and determination of any matter which might be brought into question before their Lordships; or unless any statement should be made in the petition or the case on appeal lodged by the Appellant, in pursuance of the liberty given by the above Order in Council, which might make it incumbent on the Judges of the Supreme Court to guard against any errors therein.

On the 22nd of June, 1867, the Judicial Committee appointed the hearing of the appeal for the sittings after Michaelmas Term, 1867, and expressed an opinion, that it was desirable that when the question came on to be argued, some proper party should be present representing the Crown, or the Judges of the Supreme Court, in order that the question might be solemnly considered and determined.

The Appellant accordingly lodged a case, wherein he stated the circumstances above narrated, and contended: First, that the Order of the Supreme Court of the 13th of April, 1866, was an appealable grievance within the provisions of the Order in Council of the 30th of June, 1831, regulating appeals from the Supreme

Court of Civil Justice in *British Guiana* to Her Majesty in Council, and, moreover, came within the provisions of the Act, 3 & 4 Will. 4, c. 41, s. 4, as well as the general power of Her Majesty to admit appeals in matters relating to the liberty of the subject, he being otherwise remediless in the premises; Secondly, that the Order of the 13th of April, 1866, and the judgment of the 4th of May, 1866, and the proceedings of the 2nd, 4th, 6th, 10th, and 13th of April, 1866, were severally irregular and illegal, and ought never to have been made, and that the Appellant was greatly aggrieved thereby and deeply injured, as well by such illegal proceedings as by the enforcement of the same, and was desirous, as well for the vindication of his own character and reputation, as for the right and due administration of justice and the liberty of Her Majesty's subjects in the Colony, that such Orders, judgments, and proceedings, should be declared void, as being severally and individually unwarranted, irregular, and wholly illegal, for the following reasons:—

First, because it is the undoubted prerogative of Her Majesty to admit, and has been the practice of the Judicial Committee of the Privy Council to advise, the allowance of an appeal from Orders of Colonial Courts where the liberty of the subject is involved, and in which no redress can be obtained in the Colony; the Superior Courts in this Country being, since the passing of the Statute, 25 & 26 Vict. c. 20, s. 1, expressly prohibited from interfering in such cases by writ of *Habeas corpus*.

Second, because the Supreme Court of Civil Justice of *British Guiana* was not a Court of Record, and had, in the circumstances of the case, no power to commit by summary process for the alleged contempt.

Third, because the proceedings and Orders complained of were wholly irregular as well as illegal, and, at law, absolutely null and void.

Fourth, because the articles in the "*Colonist*" Newspaper were not in themselves libels, or of such a character as tended to impede or interfere with the due administration of justice, or to bring any disrepute on the Supreme Court of Civil Justice.

Fifth, because the commitment of the Appellant to the common gaol of the Colony for six months for such alleged contempts

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of Court, and refusing him leave to appeal, was an oppressive and vindictive exercise of a supposed judicial authority, and besides inflicting a grievous and irreparable wrong upon the Appellant, tended to bring the administration of justice in the Colony into serious disrepute.

Sixth, because the Warrant of commitment was bad both in substance and form, as it purported to commit the Appellant for alleged offences, in respect of which he had neither been summoned nor duly charged; and

Seventh, because the Warrant did not contain or set forth the alleged libel on account of which the Appellant was committed.

The Chief Justice and the first puisne Judge of the Supreme Court, who constituted the Supreme Court at the time of making the Orders complained of, appeared and submitted, that the appeal should be dismissed for the following reasons:—

First, because it is not competent for Her Majesty in Council to entertain an appeal from an Order of a Court of Record, inflicting punishment by fine or imprisonment for a contempt of Court.

Second, because the Order of the Supreme Court of Civil Justice of the 13th of April, 1866, and the judgment of the Court of the 4th of May, 1866, and the proceedings had in the Court in respect of the matter of the Appellant, to which the Order and judgment related, were respectively legal and regular.

Third, because the Warrant of commitment was good and valid in substance and form.

Fourth, because the Appellant did not petition for leave to appeal in the matter, until after the period of imprisonment to which he was sentenced had expired.

Mr. *Coleridge*, Q.C., Mr. *C. E. Pollock*, Q.C., and Mr. *Edmund F. Moore*, for the Appellant.

The *Solicitor-General* (Sir *R. Baggallay*), Mr. *Archibald*, and Mr. *Cracknall*, for the Judges.

The *Solicitor-General* having taken, as a preliminary objection, the point reserved in the Order in Council giving leave to appeal, respecting the competency of Her Majesty to entertain an appeal

from an Order of a Court of Record inflicting punishment by fine or imprisonment for a contempt of Court; and the Appellant having expressly alleged, as a ground of appeal, that the Supreme Court of Civil Justice of *British Guiana* was not a Court of Record,

Lord Chelmsford intimated, on the part of their Lordships, that they would proceed to hear the case as upon a motion to rescind the Order in Council granting leave to appeal, and that such consideration being, in their Lordships' judgment, but a preliminary and formal objection, they would hear but one Counsel on either side.

Mr. *Coleridge*, Q.C.:—

The question which your Lordships deem a preliminary one, namely, whether it is competent for Her Majesty to entertain an appeal from an Order of a Court of Record, inflicting punishment by fine and imprisonment, for an alleged contempt of Court, and therefore, whether, on the assumption that the Supreme Court of Civil Justice of *British Guiana* is a Court of Record, leave to appeal in this case ought to have been granted, is a question of more importance than almost any that can be brought before this Tribunal, for it affects not the liberty of the subject alone, or the authority of the Court assuming this power, but the prerogative of the Crown to entertain an appeal from such an exercise of authority by a Colonial Court, where redress is neither to be obtained in the Colony itself, nor in any of Her Majesty's Courts in *England*. By the 25 & 26 Vict. c. 20, s. 1, the Superior Courts in this Country are expressly prohibited from interfering in Colonial cases by *Habeas corpus;* and in the Colony of *British Guiana* the Commissioners for Inquiry into the Laws of the *West Indies* expressly declare, in their Second Report (p. 8 and Appx. p. 71), that there is no such Writ known there, and no process similar, and there is certainly no Ordinance of the Colony, or Imperial Statute, which gives such or any similar remedy. It will be necessary, therefore, in the first place, to refer briefly to the history and constitution of the Supreme Court of Civil Justice originally established in *British Guiana* and as it now exists, to shew, that that Court is not, and never was, a Court of Record in the sense

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understood in the Superior Courts at *Westminster* as Courts of Record, and has none of the incidents which belong to a Court of Record which could give authority to such a commitment for contempt as has in this case been exercised.

The Colony of *British Guiana*, known formerly as *Dutch Guiana*, is a conquered Colony. By virtue of the capitulation of the 18th and 24th of September, 1803, the then existing institutions, as well as the Laws prevailing in the three several Colonies of *Demerara*, *Essequibo*, and *Berbice*, which now form the Colony of *British Guiana*, were retained and guaranteed to the inhabitants (1). The Law prevailing in these Colonies at the period of their acquisition was the old Law of *Holland*, the Roman-Dutch Law, "peculiar vernacular Laws, and the Roman Law *in subsidium*" (2); and that Law, subject to such alterations as have since been made by the Crown, the Imperial, and the Colonial Legislatures, is the Law which still prevails in the Colony, and has always been uniformly recognised and acted on as the ruling authority, as well in the Civil Courts of the Colony as by this Committee. The constitution of the Courts of Justice, and the *status* and authority of the Judges, was in accordance with that Law, and, where not expressly and authoritatively altered, remains so still. It appears from the history of the three Colonies that no material alteration in the constitution or practice of the Courts of Justice took place from the year 1803 to 1812, when there was a union of the Courts of *Demerara* and *Essequibo*, the office of President of the Court of Justice was made separate from that of the Governor, and the English language substituted for the Dutch in all legal proceedings. From that period up to the year 1831 no other alterations were made in the Courts in the Colony, except in the appointment of a President Judge, the first being Mr. *Henry*, the author of a report upon the Criminal Law of *British Guiana*, and the learned translator of *Van der Linden's* Institutes of the Laws of *Holland*. By two Orders in Council of the 23rd of April and the 20th of June, 1831 (3), the latter of which alone was acted on, the constitution as well of the Colony as of the Civil and Criminal Courts was materially changed, and instead of one Judge,

(1) British Guiana Guide, p. 3 [Ed. 1843]; Ann. Reg. 1796 and 1803; 3 Southey's Hist. of the West Indies, pp. 232–3.

(2) 2 Rep. W. I. Com. p. 3, Appx. p. 53.

(3) See these Orders in Clark's Colonial Law, p. 275

three Judges were appointed to those Courts respectively. It was, however, expressly provided by the last-mentioned Order in Council, and such provision has been recited and reserved in every Ordinance in the Colony affecting the Civil Courts since, that the Judges of those Courts "in all civil cases should have, possess, exercise, and enjoy such and the same jurisdiction, powers, and authority, in every respect, as the Judges of the said Courts had theretofore lawfully possessed, exercised, or enjoyed" (1). The original *status* and jurisdiction of the Judges was thus saved to them, and the constitution and laws administered in the Courts were, in their integrity, reserved to the inhabitants as guaranteed by the articles of capitulation.

Now, as far as regards the exercise of such reserved jurisdiction to the Judges of the Criminal Courts, that has been changed and modified by the introduction of the Criminal Law of *England* into the Colony, and the erection and constitution of a new Criminal Court. But respecting the Civil Court, the reservation of the ancient *status* and jurisdiction of the Judges remains precisely the same as it was previous to the Order in Council of the 20th of June, 1831, and the then existing constitution of the Civil Tribunals of the Colony. The law which prevailed in the three Colonies comprising *British Guiana* at the time of their acquisition, and guaranteed to their inhabitants, was the old law of *Holland* established by the Resolutions of the States of *Holland* in 1735, and carried out in the Regulations for the administration of Justice and the manner of proceeding framed by the Committee of Ten, and approved by their High Mightinesses, the Lords States General of the *United Netherlands*, on the 4th of October, 1774. These are to be found in the Great *Placaat*, or Statute Book, B. VII. p. 964: in *Van der Linden's* Inst. of the Laws of *Holland*, p. 57; and in the second Rep. of The *West India* Com. pp. 53-55, and Appx. B. p. 203. These Regulations, again, have been modified and adapted to the present state of the Colony, and the alterations in the Laws that have been introduced there, from time to time. But on examination of the various rules which now form the Code of Civil procedure in the Courts at *British Guiana*, it will be found, that both the process and practice of the Courts is founded on the Civil Law, and is referable

(1) Order in Council of 20th June, 1831, par. 8. See Clark's Col. Law, p. 276.

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to that Code of practice which existed in the Colony previous to its acquisition by the English, varied by Roman-Dutch Law. The Supreme Courts of Civil Justice thus established in 1831, were consolidated into one Court by subsequent Ordinances made in 1844 and 1846. In 1855, an Ordinance was passed (No. 26), intituled the "Amended manner of proceeding in the Supreme Court of Civil Justice of *British Guiana*." By this Ordinance it was declared, that the several Courts so previously consolidated should continue and be styled the Supreme Court of Civil Justice of *British Guiana*, and should continue to have the same jurisdiction as each of the Supreme Courts of Civil Justice of *Demerara*, *Essequibo*, and *Berbice* respectively possessed and enjoyed prior to the taking effect of the Ordinance, No. 21, of 1844 (which was the first consolidating Act), and (in the language of the Order in Council of June, 1831), it is expressly declared, that the Judges of the said Supreme Court in Civil cases, and each of them, shall "have, possess, exercise, and enjoy, such and the same jurisdiction, powers, and authority, in every respect, as the Judges of the said Courts have heretofore lawfully possessed, exercised, or enjoyed." This Ordinance of 1855 is the latest Ordinance relating to the Supreme Court of Civil Justice, and by authority of which that Court is now constituted and established. The Ordinance contains the whole Code of procedure in Civil suits, which are there described as instituted according to the Civil law, by claim and demand, and by citation, with conclusions of exception and answer, in accordance with the practice which prevailed previously in the Civil Courts of the Colony, and which, though varied and modified, is based on the Regulations of the States of *Holland* of 1735, many of which are embodied and re-enacted by this Ordinance. Now, it must be observed, that there is no provision in this Ordinance which can constitute the Supreme Civil Court a Court of Record. There is no declaration or enactment to that effect, no jurisdiction given analogous to that possessed by Her Majesty's Superior Courts at *Westminster*, but a simple repetition and reservation of the *status* and authority of the Judges, which was declared by the Order in Council of the 20th of June, 1831, and referred to, and reserved by, all the previous temporary Ordinances affecting and regulating the Supreme Civil Court. This is most significant, both of the original

intention of the Crown when the Court of Civil Justice was first erected by the Order in Council of the 20th of June, 1831, which Order was equivalent to Letters Patent, as well as of the later intention of the Colonial Legislature, when it established and constituted permanently, by the Ordinance No. 26, of 1855, the Supreme Court of Civil Justice in the Colony. In 1846, nine years previous, the present Courts of Criminal Justice were established, by Ordinance No. 26 of that year, which, in the form uniformly adopted when it is intended by Act of Parliament or Letters Patent to create a Court of Record, in sect. 2, expressly enacted, that those Courts "should be Courts of Record, and should have cognizance of all criminal pleas, and jurisdiction in all criminal cases whatsoever, as fully and amply, to all intents and purposes, in *British Guiana* as her Majesty's Courts of Queen's Bench and Common Pleas at *Westminster*, or either of them, lawfully had or hath in *England*;" and the Judges of the Criminal Court (for to that Court alone does the Ordinance apply) should have and exercise such and the like jurisdiction and authority in *British Guiana* as Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer in *England*, or any of them, lawfully have, and as should be necessary for carrying into effect the several jurisdictions, powers, and authorities committed to the said Courts respectively." Here, therefore, there was an express legislative enactment constituting the Criminal Courts of *British Guiana*, Courts of Record, not only in compliance with the unquestionable rule of law that requires such an enactment, but in the margin to the section 2 of the Ordinance, the Imperial Statute, 9 Geo. 4, c. 83, is referred to, which gave power to His Majesty to establish Supreme Courts of Judicature in *New South Wales* and *Van Diemen's Land*, both Criminal and Civil, such Courts are, sect. 3, to be Courts of Record, which they do not appear to have been, either by the previous Statute relating to the Courts in those Colonies, the 4 Geo. 4, c. 96, or the Charter of Justice of the 13th of October, 1823, granted in pursuance thereof. Thus far I have traced the constitution of the Supreme Courts of Justice in *British Guiana*. The Criminal Court, which administers the Criminal law of *England*, is established by Ordinance No. 26, of 1846, of the Colonial Legislature, in pursuance of the Order in Council of the 20th of June, 1831, and is expressly declared to be a Court of Record;

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whereas as regards the Supreme Civil Court, which administers the law of the Colony, the Roman-Dutch law, though established by the Colonial Ordinance under the same Order in Council of the 20th of June, 1831, there is no such declaration or enactment creating it a Court of Record; on the contrary, the jurisdiction and *status* of the Judges of that Court, as it existed previous to, and was reserved by, the Order in Council, is expressly referred to and preserved. I contend that nothing can be more conclusive than this, as shewing that the intention both of the Crown as well as the Legislature of the Colony, was to leave to the Supreme Civil Court its ancient constitution and procedure according to the law prevailing in the Colony.

The result must be, that the authority, if possessed by the Supreme Civil Court, to commit for a contempt, such as alleged in this case, must be by virtue of and under the Roman-Dutch law, or, in the absence of that law, under the authority of the Roman Civil Law. Now, as regards the Roman-Dutch law, I assert, without fear of contradiction, that no such power as has been here exercised exists by the Roman-Dutch law. That law was imported into the Colony from the States of *Holland,* and is, in effect, the law now prevailing and administered in the Civil Courts in that Colony. Considerable care has been taken to ascertain with correctness what the law and practice on this point prevailing in the *United Netherlands* is, and the opinion of *J. Kappeyne van de Coppelo* and *M. S. Pols,* two of the most eminent Advocates of the High Court of the *Netherlands* has been taken on this very question, both of whom give their unqualified opinion, that no such power exists in, or could be exercised by either the High Court of *Holland,* or any other Court or Judge where the Roman-Dutch law prevails; and they state the ground and authorities on which they base their opinion. I propose to read the case submitted and their opinion, as part of my argument.

LORD CHELMSFORD:—Their Lordships consider that they cannot allow this opinion to be read, however distinguished the Advocates who gave it may be.

Mr. *Coleridge:*—I will refer then only to the authorities those Advocates cite in support of their opinion, and respectfully ask your Lordships if you have any doubt on this subject, it being a question

of Foreign law, to avail yourselves of the provisions of the 24 & 25 Vict. c. 11, sec. 1, and remit a case to the *Netherlands* for the opinion of the High Court at the *Hague*. The authorities relied on for the opinion thus given are: *Petrus Bort, Tractatus de Causis Criminalibus, Lib.* I. No. 4; *J. Voet, Com. ad Pand. Lib.* V. tit. I. No. 2; *Carpzovius, Praxis Communis; Farinacius, variarum quæstionum et communino opinium criminalium,* B. I. tit. I. *Quæst.* 1, §§ 56, 57. In *Van Leeuwen, Censura Forensis,* Par. II. *Lib.* II. *cap.* xiv. No. 6; and it may be added that in *Van Leeuwen's* Commentaries on the Roman-Dutch Law, B. v. ch. 6 to 11, on the jurisdiction of Judges, no such authority as that contended for here will be found, nor in *Van der Linden's* Institutes of the Laws of *Holland,* a work of the highest authority. But a mode of proceeding in civil cases, called *Gyzeling,* or civil confinement, which is now superseded, is there described in B. III. p. I. chap. ix. sect. xvi. p. 495, which clearly shews, that the Dutch Courts possessed no power of summary conviction, and that a party, whether Judge or not, must proceed in such a case as this, as for a crime against reputation, and seek for compensation and reparation by a claim which is termed "*amende honorable et profitable*"; honourable, by causing the offending party to ask pardon in Court for the injury he has done to the other, with the declaration that he is sorry for what has happened, and that he holds the Plaintiff for a man of honour against whose character he has nothing to say; and profitable, by the payment of a certain sum to the poor. *Van der Linden,* Inst. B. I. ch. xvi. sect. iv. p. 250. And it is remarkable that this was the very process adopted by a former Chief Justice in this Colony, as appears from the report of the case of *Re Downie and Arrindell* (1), which came before this Court, and in which it was held, that the Chief Justice had as much exceeded his authority as we shall shew the present Chief Justice has in the case now before you. I refer to that case now only for the purpose of shewing that the Judges, if aggrieved, had a defined remedy by the Law of the Colony, and were bound to resort to that instead of usurping an assumed summary jurisdiction. This is further illustrated by *Grotius,* B. III. ch. 32, sec. 17, ch. 36, sec. 3; *Pand.* lib. v. tit. i.; *De Judiciis,* L. 2, § 8, *Domat.* Vol. ii. p. 8, by which it appears that, in order to exercise any

(1) 3 Moore's P. C. Cases, 414.

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such equivalent authority as has here been assumed, the Civil Law requires some overt act.

Such being the constitution of the Supreme Court of *British Guiana*, and the law prevailing there, I propose now to shew what is the nature of, and what are the essential requisites to constitute a Court a Court of Record, which the Chief Justice has assumed this Court to be, and the powers of which, even if it possessed, he has greatly exceeded. Lord *Coke's* definition of a Court of Record is—that Court which hath power to hold Pleas "*secundum legem et consuetudinem Angliæ*," 4 Inst. 260 a; 1 Inst. 117 b. It must, therefore, administer law according to the course of the Common Law of *England*, and Lord *Coke* proceeds, in p. 260, to define what a Record "*Recordum*" is, and states, that it belongs only to such Courts as are created by Parliament, Letters Patent, or prescription, and is confined to the acts of a Court that hath power to hold pleas according to the course of the Common Law. Now, no one will contend that the Common Law of *England* prevails in, or forms part of the law of, *British Guiana*. Again, we have the same authority, Lord *Coke*, who says: when a new Court is erected, it is necessary that the jurisdiction and authority of the Court should be declared, for such new Court can "have no other jurisdiction than is expressed in the erection:" 4 Inst. p. 200; *Richard Godfrey's Case* (1); *Vin.* Abr. vol. 6, tit. "Court," (F.), p. 496. It cannot then be contended, that the Order in Council of the 20th of June, 1831, which first constituted the Supreme Civil Court of *British Guiana*, created that Court a Court of Record. There is no declaration to that effect, and no words are to be found in the Order in Council admitting such a construction, which is opposed to all the provisions made by that Order in Council, and which are recognised and continued by every subsequent Ordinance, maintaining the authority of the Court and Judges as they existed previous to the acquisition of the Colony by this Country. Had it been intended to create the Supreme Civil Court in *British Guiana* a Court of Record, such intention would have been declared in the Order in Council of the 20th of June, 1831. But no such declaration is to be found. Take the analogous case of the Colony of *Ceylon*. There, also, the Roman-Dutch Law is the prevailing authority,

(1) 11 Co. Rep. 44.

modified, as in *British Guiana*, by the Charter of Justice granted in 1833, and which established the Supreme Court, but which contains no provision whatever for making that Court a Court of Record, which it has never assumed to be; whereas in the case of the *Cape of Good Hope*, where the same Roman-Dutch Law prevails, the Charter for the Supreme Court of Justice, granted in 1832, expressly creates, erects, and constitutes that Court to be a Court of Record. So in the Charter of Justice granted in 1834 to *Sierra Leone*, the Court and Council of the Colony, thereby constituted, are declared a Court of Record; whereas in the *Mauritius*, where the Code Civil of *France* is the prevailing law, there is in the Charter of Justice of the 13th of April, 1831, no provision for constituting the Supreme Court there established a Court of Record. Again, by the original Charters or Letters Patent establishing the Supreme Courts at *Calcutta*, *Madras*, and *Bombay*, those Courts are expressly created and constituted Courts of Record. The same rule applies to all the Queen's Courts in *Jamaica*, and to all the Supreme Courts in the *West India Islands* in which the laws of *England* have been introduced and established, all which are Courts of Record, and are so declared by the Acts of Parliament, Charters, or Letters Patent establishing them. These instances will suffice to shew that—as in Lord *Coke's* time, so in the present day—when a Superior Court is erected by Letters Patent from the Crown, and it is intended that such Court shall be a Court of Record, such intention is plainly and palpably expressed, and the Court so erected is declared, in unequivocal terms, to be a Court of Record. The same practice prevails, and the same rule is invariably adopted by Parliament—when a new Court is established and a new jurisdiction given, and the Court erected is intended to be a Court of Record, it is expressly so provided. Thus in the case of the High Court of Admiralty, where the procedure originally was according to the Civil Law: that Court, like the Ecclesiastical Courts, was not a Court of Record, *Thomlinson's Case* (1), till it was declared so quite recently by the 14th section of the 24 Vict. c. 10. So the Court for the Relief of Insolvent Debtors, which was established by the 1 Geo. 4, c. 119, was declared (sect. 1) by that Statute, as well as the subsequent Statute of the 7 Geo. 4, c. 57, s. 3, to be a Court of

(1) 12 Co. Rep. 104.

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Record. By the 1 & 2 Will. 4, c. 56, s. 1, power was given to the Crown to erect and establish a Court of Judicature, to be called the Court of Bankruptcy; and by the Letters Patent creating the Court it was expressly declared, that such Court should be a Court of Record: yet, notwithstanding, doubts having arisen whether the Court of Review established by the same Act was a Court of Record, it was declared so by the Act, 5 & 6 Will. 4, c. 29, s. 25. *Rex* v. *Faulkner* (1) was the occasion of this enactment; and Lord *Abinger*, in giving judgment in that case, defines very clearly the nature and object for which a Court is created a Court of Record, and expressly repudiates the notion that such a Court can be created by inference, or by anything but direct legislative enactment. In the Act establishing the present County Courts, the 9 & 10 Vict. c. 95, such Courts are by sect. 3 declared to be Courts of Record. These authorities are, I submit, abundantly sufficient to shew that the Supreme Court of Civil Justice in *British Guiana* cannot be termed or treated as a Court of Record. It has none of the characteristics or incidents claimed for such Courts in this Country, whence alone Courts of Record originate. This will be more apparent when we come to examine into the manner in which the power assumed, has been exercised by the Judges of the Court at *British Guiana;* when we shall shew that the whole proceedings of the Supreme Court of *British Guiana*, from first to last, were not only illegal and unwarrantable, but absolutely void for irregularity, and that the Appellant has been subjected, most unjustly and most undeservedly, to a course of persecution and oppression which, if permitted or sanctioned by the application of a supposed technical rule excluding the jurisdiction of Her Majesty in such a case, will leave Her subjects in the Colonies as regards their personal liberty, as well, as it may be, the privileges of the press, at the discretion and mercy of the Judges who may happen to preside in the Superior Courts. I am precluded by the restriction your Lordships have laid me under, that I should argue the question of jurisdiction alone, and first, from entering upon the grave questions that arise in this case, not merely upon the authority for the jurisdiction assumed by the Judges of the Supreme Court, but for the exercise of a jurisdiction which, even if it existed, has been not only

(1) 2 C. M. & R. 525—532.

irregularly but illegally put in force. I apprehend, however, that your Lordships will entertain no doubt of Her Majesty's right to interfere in such a case by virtue of Her prerogative, and to hear such an appeal as this; which, until questioned by the terms of the Order made in Council in this particular case, was never doubted before: *Smith* v. *The Justices of Sierra Leone* (1); *Rainy* v. *The Judges of Sierra Leone* (2); *In re Downie and Arrindell* (3); *In re Wallace* (4); *In re Stewart* (5). In *Pollard's Case* (6), decided very recently by this Tribunal, where a party was adjudged to have been guilty of a contempt of Court and fined, their Lordships felt themselves at liberty, notwithstanding that the Supreme Court of *Hong Kong*, in which such jurisdiction had been exercised, was a Court of Record, to inquire into the nature of the alleged offence, and being of opinion that it was not properly a contempt of the Court, or legally an offence, they recommended the remission of the fine imposed, which was done accordingly. The Statute, 3 & 4 Will. 4, c. 41, s. 4, gives ample authority to the Crown to refer any matter Her Majesty may see fit to this Committee, and reserves, therefore, the right of appeal in cases like the present, and the competency of Her Majesty to entertain such an appeal, if properly brought before Her, cannot be questioned. Were this Court to hold, that there is no appeal from an Order of commitment to the Queen in Council, even if made by a *bonâ fide* Court of Record in one of the Colonies, there is no limit to the injustice and even tyranny which might be exercised by an indiscreet or vindictive Judge towards Her Majesty's subjects abroad. But in this case we say confidently, that the act complained of cannot even be sheltered under such a plea, for the Supreme Civil Court of *British Guiana* is not a Court of Record, and had no such power to commit as has been exercised, and as we complain of.

The *Solicitor-General*:—

The terms of the Order in Council made in this case reserve the question of Her Majesty's right to entertain such an appeal as this; and assuming, as we contend the fact is, that the Supreme Court

(1) 3 Moore's P. C. Cases, 361.
(2) 8 Ibid. 47.
(3) 3 Ibid. 414.
(4) Law Rep. 1 P. C. 283.
(5) Ibid. 2 P. C. 88.
(6) Ibid. 2 P. C. 106.

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of Civil Justice of *British Guiana* is a Court of Record, the Order itself precludes your Lordships from entertaining this appeal. It is not necessary to argue the point regarding the origin and history of the Supreme Court of Civil Justice of *British Guiana*. The Civil Court, as well as the Criminal Court, is constituted by an Ordinance of the Colony, which is equivalent to an Act of Parliament. By the Order in Council of the 20th of June, 1831, it is expressly provided, that the decision of the majority of the Judges shall in all civil cases at any time depending in their Courts be taken and adjudged to be, and shall be recorded as, the judgment of the whole Court. Now, though the latter words are not found in the Ordinance, No. 26 of 1855, for continuing the Civil Courts of Justice in the Colony, and prescribing the rules and mode of practice in those Courts, yet there was no necessity for declaring such Courts to be Courts of Record, as they had already been created such, and were possessed of all the powers incident thereto. Not so the Criminal Courts, which are expressly declared Courts of Record by the Ordinance No. 26, of 1846, with powers and authority similar to Her Majesty's Judges at *Westminster*. But previously and in the year 1844, by Ordinance No. 22, trial by jury had been established, which, by an Ordinance No. 19, of 1846, was extended to all issues in civil suits. This, I apprehend, would sufficiently constitute the Supreme Court a Court of Record. In *Rainy* v. *The Justices of Sierra Leone* (1) trial by jury was held to constitute a Court of Record (2), which clearly shews that the leave granted and the Order made in the previous case of *Smith* v. *The Justices of Sierra Leone* (3) was an error, and ought not to have been granted, as a Court of Record is the sole judge of what constitutes a contempt. With regard to the argument derived from the *dicta* of Lord *Coke*, it is stated in *Bacon's* Abr. tit. "Courts," B., that a Court of Record is a Court of general jurisdiction. That is the character of the Supreme Court of *British Guiana;* the Order in Council of 1831, under which it is constituted, as well as all the subsequent Ordinances affecting it down to that of 1855, all concur in giving it such a general jurisdiction in civil causes as is alone compatible with a Court of Record, and such, therefore, it must be

(1) 8 Moore's P. C. Cases, 47. (2) 8 Moore's P. C. Cases, 54.
(3) 3 Moore's P. C. Cases, 361.

held to be; and, if so, *cadit questio*, for this Tribunal cannot inquire into an Order made by such Court in the exercise of its discretion. Again, the term of imprisonment had expired before leave given, and this Court will not interfere: *Levien* v. *The Queen* (1). We are prepared, however, to support the Order on the merits if your Lordships require us.

LORD CHELMSFORD:—

In this case an application was originally made *ex parte* for leave to permit the Appellant to appeal from an Order of the Supreme Court of Civil Justice of *British Guiana*, committing him for a contempt, and their Lordships upon that occasion advised Her Majesty to allow the Appellant to enter and prosecute his appeal, without prejudice to the question of the competency to entertain an appeal from an Order of a Court of Record, inflicting punishment by fine or imprisonment for a contempt of Court (2). It is quite clear that, upon that *ex parte* application, and upon the leave which was conditionally granted, the Respondents might have come in, and have moved to discharge the Order, upon the very ground which has been taken to-day, namely, that there can be no appeal against an Order of a Court of Record committing a person for contempt. The Appellant, therefore, is exactly in the same condition now as if the application had been made to rescind that Order, and he would be bound to support the propriety of the leave to appeal by shewing either that the Court was not a Court of Record, or that, if it was a Court of Record, yet there was something in the Order committing the Appellant for contempt which rendered it improper, and, therefore, the subject of appeal.

The first question, therefore, which the Appellant had to establish was, that the Supreme Court of Civil Justice of *British Guiana* was not a Court of Record. For that purpose his Counsel has argued at very considerable length—not at too much length—that originally by the constitution of the Court, which in its origin was a Dutch Court, it was not, according to the Dutch law, a Court of Record, and that, according to that law, it was a Court which did not possess the power of committing for contempt.

(1) Law Rep. 1 P. C. 536.
(2) See Form of Order, *In re McDermott*, Law Rep. 1 P. C. 268.

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In the year 1803, in the articles of Capitulation, upon the conquest of *Demerara*, there was a stipulation that the laws in use in the Colony should remain in force and be retained. The constitution of the Supreme Court at this time, and down to the period of the Ordinances which established it on its present footing, by the account given of it in *Clark's* Colonial Law, p. 245, appears to have been that it consisted of a President and eight Members, of whom four and the President were to be present to constitute a Court. The President was appointed by the King, and removeable at his pleasure. The other Members were Planters or Merchants of the Colony, elected by the College of *Kiezsers*, who, when vacancies occurred, returned a double number, from which the Court of Justice made a selection. In the month of May of every second year one-third of these Colonial Members vacated their seats, beginning with the oldest Member, and, as their number was eight, three and two would vacate every alternate second year. The constitution of this Court might be satisfactory to the Colony, but it did not appear to have been one very desirable to be continued.

Accordingly, by an Order in Council made in June, 1831, and by an Ordinance of the Colony passed in 1855, an entirely new Supreme Court of Justice was established—by the former Order for *Demerara* and *Essequibo*, and by the latter this Court, which had been united with the Court of Civil Justice of *Berbice*, was "to be consolidated into one Court, styled the Supreme Court of Civil Justice of *British Guiana*, and to continue to have the same jurisdiction as each of the Supreme Courts of Civil Justice of *Demerara* and *Essequibo* and of *Berbice*, and as such consolidated Court then possessed; and it provided that the Judges of the said Supreme Court, and each of them, should have, possess, exercise, and enjoy such and the same jurisdiction, powers, and authority in every respect as the Judges of the said Supreme Courts had theretofore lawfully possessed, exercised, or enjoyed."

Now, it is to be observed, that this Ordinance is, in fact, equivalent to an Act of Parliament. Therefore, the question is, whether this Act of Parliament, as it may correctly be styled, did not establish this new Court in the Colony to be a Court of Record.

What, then, were the powers which the Supreme Court lawfully possessed, exercised, or enjoyed at the time of the passing of this

Ordinance? For these we are referred to the Order in Council of the 20th of June, 1831, which, by par. 2, provided for altering the original constitution of the Court, and ordered "That henceforth the Court of Criminal and Civil Justice of *Demerara* and *Essequibo*, and the Court of Civil Justice, and the Court of Criminal Justice of *Berbice*, shall be holden by and before three Justices, and no more, and that the first or presiding Judge of the said Court shall be called and bear the style and title of Chief Justice of *British Guiana*, and that the second and third of such Judges shall be called and bear the respective styles and titles of first Puisne Judge and second Puisne Judge of *British Guiana*." In the provision made for the jurisdiction of the Judges in civil cases, it is ordered, "That in each of the said Courts respectively the said three Judges of the respective Colonies shall in all civil cases have, possess, exercise, and enjoy such and the same jurisdiction, powers, and authority in every respect as the Judges of the said Courts have heretofore lawfully possessed, exercised, or enjoyed; and that the decision of the majority of such three Judges shall, in all civil cases at any time depending in the said respective Courts, be taken and adjudged to be, and shall be, recorded as the judgment of the whole of such Court."

It might be said, without going further, that this provision in the Order in Council of June, 1831, with respect to the powers and authority of the Judges (which are preserved to them by the Ordinance of 1855), in terms constituted the Supreme Court a Court of Record, for no other interpretation can be fairly put upon the words "that the decision of the majority of the Judges shall be taken and adjudged to be, and shall be recorded as the judgment of the whole of such Court."

But it was argued by Mr. *Coleridge*, that in the year 1846 a Criminal Court was established in *British Guiana*, and that this Criminal Court was expressly declared to be a Court of Record. For by the second article of that Ordinance it is enacted "That the Supreme Courts of Criminal Justice in *British Guiana* shall be Courts of Record, and shall have cognizance of all criminal pleas and jurisdiction in all criminal cases whatsoever as fully and amply, to all intents and purposes, in *British Guiana*, as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at *Westminster*."

From this Ordinance he drew the following argument:—Here

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(he said) is an Ordinance in the year 1846, which orders that the Court of Criminal Jurisdiction shall be a Court of Record. It says nothing with regard to the Supreme Court of Civil Justice, and, therefore, impliedly, it must be taken that that Court was not to be a Court of Record. In other words, the Order in Council of 1831, and the Ordinance of 1855, having, according to the view of their Lordships, constituted the Supreme Court of Civil Justice a Court of Record, an Ordinance of 1846, referring solely to the establishment of a Criminal Court, is to have the effect by force of the words making it a Court of Record of proving that the Court of Civil Justice is not a Court of Record.

Their Lordships were referred by the Solicitor-General to an Ordinance which immediately preceded that upon which Mr. *Coleridge* laid so much stress, which was the Ordinance, No. 19, of the year 1846, which provided that there might be a trial by jury in all issues in civil cases, and that the Supreme Court of Civil Justice might try at bar with a jury any cases which they thought it was right and proper should be so tried.

Now, in the case of *Rainy* v. *The Justices of Sierra Leone* (1), where a question arose whether the Recorder's Court of *Sierra Leone* was a Court of Record or not, and whether the Court, being a Court of Record, would have power to commit for contempt, their Lordships said:—"The Recorder's Court is created by the Charter of Justice, dated the 17th of October, 1821, and is authorized to hear and determine all civil suits, actions, and pleas, which may happen within the Colony, and the charter directs that, in all cases where the action would, if the parties were resident in *England*, be tried by a jury, such action shall be tried before a jury in the Court of the Recorder, according to the practice in *England*. That being the constitution of the Court, in regard to trial by jury, we are of opinion, that it is a Court of Record, and that the law must be considered the same there as in this country, and, therefore, that the Orders made by the Court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another Court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such Orders" (2).

(1) 8 Moore's P. C. Cases, 47. (2) 8 Moore's P. C. Cases, 54.

If, therefore, it had been shewn to their Lordships in the clearest and most satisfactory manner, that, according to the old Dutch law and the original constitution of this Court in the Colony of *British Guiana*, it had no power whatever to commit for contempt, still, under the Order in Council of 1831, and the Ordinance of 1855, they would entertain no doubt that the old Dutch law was completely superseded, and that this Court was established as a Court of Record by that which is equivalent to an Act of Parliament.

Under these circumstances, the Supreme Court of Civil Justice being a Court of Record, it is only necessary to refer to cases in which appeals have been made to the Judicial Committee from Orders committing parties for contempt by Colonial Courts of Record, to see whether this is a case in which their Lordships would think it proper, according to those authorities, that the Appellants should have a right to appeal. Not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the Order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an Order of this description.

The cases to which we have been referred are all cases very special in their circumstances, and in which leave was given, owing to some peculiar objection to the committals for contempt. In the case of *Smith* v. *The Justices of Sierra Leone* (1), there was an Order of the Recorder's Court of *Sierra Leone*, disbarring and striking off from the Rolls a Practitioner of that Court for alleged contumelious conduct. But, in addition to this Order, there was a distinct and separate one, ordering Mr. *Smith* to be fined and imprisoned for the same alleged contempt. Now, the mode in which the Committee dealt with these Orders brings out the distinction as to the right to appeal in these cases in the clearest manner. Mr. *Smith's* petition was presented through the Secretary of State, and, after considerable delay, it was, by an Order in Council, referred to the Judicial Committee. Their Lordships in that case entertained the petition against the Order for disbarring Mr. *Smith* and striking him off the Roll, because they held that

(1) 3 Moore's P. C. Cases, 361.

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that was not an appropriate punishment for a contempt of Court. They took no notice of the Order for imprisonment, which they seemed to consider to be in the same category with the fine; but with regard to the fine imposed by the Court for contempt, they held that they had no jurisdiction over it, and that they could not entertain the appeal.

In the case of *Downie and Arrindell* (1), there was an application first of all, and special leave granted to appeal from two Orders of the Supreme Court of *British Guiana* suspending the Petitioners from practice for six months. The Orders in this case were reversed upon the same ground as in the previous case to which we have referred.

In *Rainy's Case* (2) both the cases previously referred to were cited, and, therefore, their Lordships had before them the consideration of the whole question as to the propriety of entertaining appeals of this description.

Under these circumstances, their Lordships entertain no doubt whatever as to the propriety of deciding that in this case the leave to appeal ought not to have been granted; that the Supreme Court of Civil Justice was a Court of Record; and that as a Court of Record it had power to commit for this particular contempt.

As their Lordships do not enter into the merits of the case, they will say nothing as to the character of the libel upon which the Court thought it proper to commit the Publisher for contempt; but their Lordships will humbly report to Her Majesty as their opinion that Her Majesty's Order in Council of the 10th November, 1866, whereby leave to appeal was conditionally granted in this case ought to be rescinded, and this appeal dismissed with costs.

Solicitors for the Appellant: *Whitakers & Woolbert.*
Solicitors for the Treasury for the Respondents.

(1) 3 Moore's P. C. Cases, 414. (2) 8 Moore's P. C. Cases, 47.

JOHN MARTIN . . . . . APPELLANT;

AND

THE REV. ALEXANDER HERIOT MACKONOCHIE, CLERK . . . . . RESPONDENT.

J. C.*
1868
Nov. 17, 18, 19, 20.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical Law—Rubrics, Construction of—Kneeling by Celebrant during Consecration Prayer—Lighted Candles on Communion Table—Proceedings under 3 & 4 *Vict. c.* 86—*Practice—Acts of Uniformity, application of—Injunctions of* 1547—*Repealed by* 1 *Eliz. c.* 2.

In a proceeding against a Clerk in Holy Orders, under the *Church Discipline Act*, 3 & 4 Vict. c. 86, for offending against the Laws Ecclesiastical, (1) in kneeling or prostrating himself before the consecrated Elements, and (2) in using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles were not wanted for light:—

Held, on appeal (reversing the decree of the Arches Court), first, that, according to the Rubric, the Celebrant during the prayer of consecration in the order of administration of the Holy Communion must stand, and not kneel or prostrate himself before the consecrated Elements during the reciting of the prayer, and that the words "standing before the Table" apply to the whole sentence in the Rubric, and to all the acts directed to be done: that, therefore, a change of posture is a violation of the Rubric which immediately precedes the prayer of Consecration, and constitutes an Ecclesiastical offence within the meaning of the Uniformity Acts, 13 & 14 Car. 2, c. 4, ss. 2, 17, 24, taken in connection with 1 Eliz. c. 2, and is punishable by admonition under sect. 23 of the latter Act, and does not belong to the category of cases which, according to the preface to the Prayer Book, should be referred to the Bishop of the Diocese for his direction:

Held, further, that it is not open to a Minister of the Church, or to the Judicial Committee in advising Her Majesty as the highest Ecclesiastical Tribunal of appeal, to draw a distinction in acts which are a departure from, or a violation of the Rubric, between those which are important, and those which appear to be trivial, the object of the *Act of Uniformity* being, as the preamble expresses it, to produce "an universal agreement in the public worship of Almighty God:" and the rule laid down by the Judicial Committee in *Westerton* v. *Liddell* (1) that, "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in

(1) Special Report of the cases of *Westerton* v. *Liddell*, and *Beal* v. *Liddell*, by E. F. Moore. 8vo. Lond. 1857, p. 187.

* *Present:*—THE LORD CHANCELLOR (LORD CAIRNS), THE ARCHBISHOP OF YORK, LORD CHELMSFORD, LORD WESTBURY, SIR WILLIAM ERLE, and SIR JAMES WILLIAM COLVILE.

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it must be strictly observed; no omission and no addition can be permitted," adhered to and affirmed.

Held, secondly, that it is unlawful to place lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles are not wanted for the purpose of giving light, (1) as the use of lighted Candles, if intended as a ceremony, or ceremonial act, is not among the ceremonies which are retained in the Prayer Book, and must, therefore, be included among those that are abolished and prohibited by 1 Eliz. c. 2, ss. 4 and 27, which Statute is applicable to the present Prayer Book, and by which the Royal Injunctions issued in the first year of *Edward* VI. (A.D. 1547), even if they possessed statutable authority, were, so far as they could be taken to authorize the use of lights as a ceremony or ceremonial act, abrogated and repealed; and (2) if Candlesticks and Candles were intended to be as Ornaments when lighted, and used with reference to a service in which they are to act as symbols and illustrations, they are not Ornaments within the meaning of the Rubric, as they are not prescribed by the authority of Parliament as mentioned in the Rubric to the first Prayer Book; nor are the Injunctions of 1547 the "authority of Parliament" within the meaning of that Rubric; nor are lighted Candles subsidiary to the service, for they do not facilitate, much less are they necessary to, the service; nor can a separate and independent Ornament, previously in use, be said to be consistent with a Rubric which is silent as to it, and which, by necessary implication, abolishes what it does not retain.

Construction of the Rubric as to Ornaments, in the commencement of the Prayer Book, which provides that "such Ornaments of the Church and of the Ministers thereof, at all times of their Ministration, shall be retained and be in use as were in this Church of *England*, by authority of Parliament, in the second year of the Reign of King *Edward* VI." considered, and the following propositions laid down and decided in *Westerton* v. *Liddell* (1) recognised and affirmed:—

First, that the words "authority of Parliament" in the Rubric refer to and mean the Act of Parliament 2 & 3 Edw. 6, c. 1, giving Parliamentary effect to the first Prayer Book of *Edward* VI., and do not refer to or mean Canons or Royal Injunctions having the authority of Parliament made at an earlier period (2).

Second, that the term "Ornaments" in the Rubric means those articles the use of which, in the services and ministrations of the Church, is prescribed by that Prayer Book (3).

Third, that the term "Ornaments" is confined to those articles (4).

Fourth, that though there may be articles not expressly mentioned in the Rubric the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services; as an organ for singing, a credence Table from which to take the sacramental bread and wine, cushions, hassocks, &c (5).

It is too late to object to a Citation, as shewing no Ecclesiastical offence to

(1) Special Report of the cases of *Westerton* v. *Liddell* and *Beal* v. *Liddell*, by E. F. Moore. 8vo. Lond. 1857.
(2) Ibid. p. 160.
(3) Moore's Special Rep. p. 156.
(4) Ibid. p. 156.
(5) Ibid. p. 187.

have been committed, after the accused Clerk has appeared without protest and prayed for Articles, which operates as a waiver.

There is no analogy between an indictment and the process for admonition under section 23 of 1 Eliz. c. 2, in respect to Ecclesiastical offences.

THIS was a cause of the office of the Judge, promoted by the Appellant, a Parishioner of the Parish of *St. Alban's, Holborn*, in the Diocese of *London*, against the Appellant, the Incumbent and perpetual Curate of the Church of that Parish, for having, within his said Church, and within two years last past from the date of the institution of the cause, offended against the Laws Ecclesiastical in the following matters:—

First, by having, during the prayer of consecration, in the order of the administration of the Holy Communion, elevated the Paten above his head, and permitted and sanctioned such elevation, and taken into his hands the Cup and elevated it above his head during the prayer of consecration, and permitted and sanctioned the Cup to be so taken and elevated, and knelt or prostrated himself before the consecrated Elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other Clerks in Holy Orders.

Second, by having used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light, and permitted and sanctioned the use of lighted Candles.

Third, by having used incense for censing persons and things in and during the celebration of the Holy Communion, and permitted and sanctioned such use of incense, and having unlawfully used incense in and during the celebration of the Holy Communion, and permitted and sanctioned such unlawful use of incense.

Fourth, by having, during the celebration of the Holy Communion, mixed water with the wine used in the administration of the Holy Communion, and permitted and sanctioned such mixing, and the administration to the Communicants of the wine and water so mixed.

The cause came before the Arches Court of *Canterbury* by Letters of Request from the Lord Bishop of *London* to the late Dean of the Arches (the Right Honourable Dr. *Lushington*), under

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the provisions of the *Church Discipline Act*, 3 & 4 Vict. c. 86. By the Letters of Request, the Respondent was charged, so far as related to the questions raised in the present appeal, with having offended against the Laws Ecclesiastical by elevating the Elements in the service of the Holy Communion, as before stated; and "by bowing, kneeling, or prostrating himself before the consecrated Elements during or after the Prayer of Consecration;" and "by using lighted Candles on the Communion Table during the celebration of the Holy Communion at times when such lighted Candles were not wanted for the purpose of giving light, and by permitting and sanctioning such use of lighted Candles:" and the Official Principal of the Arches Court was thereby requested to issue a Citation or Decree calling upon the Respondent to appear at a certain time and place therein specified, "to answer to certain articles, heads, positions, and interrogatories touching his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for having offended against the Laws Ecclesiastical in the matters thereinbefore specified, to be administered to him at the voluntary promotion of the Appellant, and to hear and determine the cause according to the law and practice of the Court." Such Letters of Request having issued, the Respondent was cited and appeared, whereupon Articles were brought in on behalf of the Appellant, the admission of which was, in the first instance opposed, but having been reformed, as directed by the Court, were afterwards admitted (1). To these articles a responsive plea was filed by the Respondent, for the most part admitting the facts as pleaded, but denying that any offence against the Ecclesiastical Law had been committed (2).

(1) The Articles, as reformed and finally admitted, are set out *in extenso* in the report of the case in the Arches Court, Law Rep. 2 A. & E. 117. See also *post*, pp. 377–8, where the Articles and plea material to the two points raised by the appeal are referred to.

A report of the case on the admission of the Articles is to be found in the Law Journal, vol. xxxvi. (N.S.) Eccles. p. 25, and the judgment, with the learned Judge's reasons for refusing leave to appeal therefrom. For the proceedings in *Flamank* v. *Simpson*, which was a similar case to *Martin* v. *Mackonochie*, and heard with it, on the admission of the Articles, see Law Rep. 1 A. & E. 276; S. C. on appeal, Law Rep. 1 P. C. 463.

(2) The substance of the plea will be found in Law Rep. 2 A. & E. 120, which contains the judgment of Sir *Robert Phillimore*, the Dean of the Arches.

W.S.C. 12 Jur. N.S. 1025.

The cause having been set down for hearing, an objection was taken on the part of the Appellant to its being heard by Sir *Robert Phillimore,* he having been Counsel in the cause previous to his appointment as Official Principal of the Arches Court in succession to Dr. *Lushington,* whereupon he decreed a Special Commission to issue to certain Commissioners therein named, authorizing them to hear and determine the cause.

The Respondent entered a protest against the cause being so heard, and obtained a Writ of Prohibition from the Court of Queen's Bench, prohibiting such Commissioners from hearing or further proceeding in the cause, whereupon the Commissioners returned into the Registry the Special Commission, and renounced all power and authority given to them thereby; and the Commission was revoked by Sir *Robert Phillimore.*

The cause was then heard before Sir *Robert Phillimore,* the argument occupying twelve days (1); two witnesses only were examined on behalf of the Appellant. With reference to the kneeling or prostrating it appeared that the Respondent, when himself officiating in the order for the administration of the Holy Communion, twice knelt down or prostrated himself before the Communion Table while saying the prayer of consecration, once

(1) A complete report of the argument in the Court of Arches, with extracts from the authorities, both legal and ecclesiastical, cited and referred to by Counsel on either side, as taken and verified by the Short-hand Writers, was given in evidence before the Ritual Commissioners, and, with the judgment of the learned Dean of the Arches, containing his own notes and illustrations, is to be found in the Appendix to their Second Report, April, 1868. That Appendix also contains verified copies of Injunctions and Visitation Articles from A.D. 1561 to 1730. The Report itself, and the other evidence accompanying it, contains a learned exposition of the Ecclesiastical usage and law, applicable as well to the points originally raised in the cause, as those in this appeal. These authorities were copiously used and referred to in the argument before the Judicial Committee, but as they are, for the most part, matters of Ecclesiastical history, and were not referred to or relied on by their Lordships in their judgment; and inasmuch as the Editor could not do justice to them without setting them out at greater length than the limits of an ordinary report allow, he is reluctantly compelled to omit them, and to refer the Reader to the sources above mentioned, which, with the abstract of the pleadings given in Law Rep. 2 A. & E. 117, and the judgment of the learned Judge, constitute a complete history of the case in the Arches Court.

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after the consecration of the Bread, and again after the consecration of the Cup, and that another officiating Minister did the same in his presence. With reference to the use of lighted Candles, the facts, as alleged in the Articles, were substantially admitted.

On the 28th of March, 1868, Sir *Robert Phillimore*, by his Interlocutory Decree or sentence, pronounced that all the Articles given in and admitted in the cause, except the sixth and twelfth therein specified, were established, and that the Respondent had offended against the Statute Laws, Constitutions, and Canons of the Church of *England* in the particular matters alleged and set forth in the Articles, in manner as in the Decree was thereinafter mentioned; and monished the Respondent to abstain for the future from the elevation of the Cup and Paten during the administration of the Holy Communion, as also from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, as pleaded in the Articles; but declined to pronounce that the Respondent had offended against the Statute Law, and the Constitutions and Canons Ecclesiastical, by having knelt or prostrated himself before the consecrated Elements during the prayer of consecration, and by having permitted and sanctioned such kneeling or prostrating by other Clerks in Holy Orders; and omitted or declined to admonish him against so offending in future; and omitted or declined to pronounce that the Respondent had offended against the Statute Law, and the Constitutions and Canons Ecclesiastical, by having used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light, and by having permitted and sanctioned such use of lighted Candles; and omitted or declined to admonish him against so offending in future; and declined to condemn the Respondent in the costs incurred in the cause on the part and behalf of the Appellant (1).

This Decree or sentence was the subject of the present appeal; but was limited to the kneeling or prostrating before the consecrated Elements, and the use of lighted Candles, and to the refusal to allow costs; the decree of the Court below in other respects was acquiesced in by both parties.

(1) Law Rep. 2 A. & E. 116.

Mr. *A. J. Stephens*, Q.C., and Mr. *Archibald*, (Mr. *Coleridge*, Q.C., Mr. *Traill*, and Mr. *Droop*, with them), for the Appellant:—

Every Clerk in Holy Orders of the United Church of *England* and *Ireland*, in administering the sacraments and other rites and ceremonies of the Church, is bound to use the form and order prescribed for the same in the Book of Common Prayer, without any addition, alteration, or omission; that was so held and solemnly decided, in the case of *Westerton* v. *Liddell* (1), by this Tribunal in the year 1857, of which a special report has been published by Mr. *Moore*. The kneeling or prostrating before the consecrated Elements, and the use of lighted Candles, as proved and admitted in the cause, are additions to, or alterations of, the form and order prescribed. The elevation of the Paten and Cup during the prayer of consecration, having been discontinued by the Respondent during the pendency of the cause (though disapproved of and declared illegal by the Judge of the Arches Court, formed no part of his judgment), is not in question in this appeal. The prostrating before the Elements was held by the Judge to be a matter, not of criminal procedure, but within the discretion and direction of the Ordinary.

First, then, with respect to the kneeling or prostration. We insist, that the kneeling adopted by the Respondent was irregular and improper. That it was used, resorted to, repeated, and prolonged at times, and in a manner, not directed or sanctioned by the Rubric. The judgment of the learned Judge of the Arches upon this point is very brief; he seems to question the proofs, though the testimony of the witnesses is unimpeached, and the charge contained in the Articles was admitted by the Respondent's plea. His judgment appears, however, to rest chiefly on his view of the Rubric to the general confession in the service of the Holy Communion, which, though it does not give precise directions that the Celebrant shall kneel at the time of consecration, yet directs the confession to be made by one of the Ministers, both he and all the people kneeling; and he seems to think, that the kneeling posture of the Minister when consecrating the Elements is allowable within the meaning of that Rubric, and that this inference and conclusion is illustrated by the fact that at the *Savoy* Conference, when the

(1) Moore's Special Rep. p. 187.

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Puritans demanded a more specific Rubric touching the kneeling at the Communion, no notice of this request was taken by the Bishops: *Cardwell's* Conferences, pp. 275, 363; he infers therefore that the position of the Minister at such time is discretionary on his part, or if not, the error imputed to the Respondent is not such an offence as could form the subject of a criminal prosecution, but that if it was an offence, it belonged to the category of those cases which should be referred to the Bishop in order that he might exercise jurisdiction according to the Rubric. This, we submit, is a wholly erroneous view of the Rubric, contrary to the *Act of Uniformity*, 13 & 14 Car. 2, c. 4, as well as the previous Statutes, 2 & 3 Edw. 6, c. 1, and 1 Eliz. c. 2. In the argument in the Court below the kneeling and prostration was connected with the elevation of the Elements, and the authorities referred to respecting the elevation applied equally to the posture; but the Rubric, the authorities, and the almost universal custom, are all entirely against the practice of such kneeling and prostration. The effect of the directions in the Rubric is, that the Minister is not at liberty to change his position according to his own fancy, but must follow strictly the direction there set forth, and especially, as at the time of the consecration of the Elements, he is directed to remain in a standing position, and not to kneel or prostrate himself as has been the practice of the Respondent.

Secondly, as to the use of the lighted Candles on the Communion Table during the celebration of the Holy Communion. It was pleaded and admitted, though there was some slight discrepancies as to particular days, that the Respondent used lighted Candles on the Communion Table during the celebration of the Holy Communion at times when such lighted Candles were not wanted for the purpose of giving light. The learned Judge of the Court below treated this question as falling within the rule regarding Ornaments, as expressly sanctioned by the laws of the Church, and after observing that "There is no express direction in the Rubric, or in the Statutes of Uniformity, or in the Canons of 1603, for the use of lights at all on the Holy Table (1)," he then says "there is no direct prohibition of this ornament of Divine service," and he proceeds to inquire, whether "the use of lights on the

(1) Law Rep. 2 A. & E. 220.

Holy Table falls under the category of things indirectly, or by necessary implication, prohibited," and if not, that they might be treated as "innocently subsidiary to Divine worship." We submit, however, that lighted Candles are not Ornaments of the Church within the legal meaning of the word, "*Ornamentum*," as interpreted by this Tribunal in *Westerton* v. *Liddell* (1). In *Parker* v. *Leach* (2) the difference between the Altar in the Roman Catholic Church and the Communion Table in the Protestant Church is pointed out. But the learned Judge of the Arches Court, after a most elaborate and interesting examination of the introduction and use of lights and lighted Candles in the services of the Church, from the earliest periods preceding the Reformation, and an investigation of the authorities, both lay and clerical, on the subject, giving, as this part of his judgment does, a complete history of the origin and object of the practice, and relying for the retention of those we contend against, on the Royal Injunctions of 1547 (Edw. VI.; *Cardwell's* Doc. Ann. pp. 5, 6), arrives at the following conclusion; that inasmuch as he thinks that these Injunctions were issued under statutable authority, and have not been directly repealed by the like authority; inasmuch as they are not emblematical of any rite or ceremony rejected by our Church at the time of the Reformation; inasmuch as they are primitive and Catholic in their origin, Evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the Injunction which ordered their retention in the Church, adds, "I am of opinion that it is lawful to place two lighted Candles on the Holy Table during the time of the Holy Communion for the signification, in the language of the Injunctions, 'that Christ is the very true light of the world.'" Now we contend that, whether these Injunctions were lawfully issued under Statutable authority, or not, they have been subsequently abrogated by like authority, and we insist that the authorities cited and relied upon by the Court below do not sustain the legal character of the Injunctions of 1547, for it is clear that these Injunctions, if they ever had any established authority, were wholly repealed in the same year they were issued, by the *Act of Uniformity*, 1 Edw. 6, c. 12, and had never since been revived, either by the *Uniformity*

(1) Moore's Special Rep. p. 156. (2) 4 Moore's P. C. Cases (N.S.) 199.

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Act of 1 Eliz. c. 2, or the last *Uniformity Act*, 13 & 14 Car. 2, c. 12. We contend, moreover, that the Ecclesiastical authorities cited by the learned Judge do not sustain the conclusion drawn from them, and we refer in support of our view to *Strype's* Annals of the Reformation, pp. 196, 197 [Oxford Ed.]; *Zurick's* Letters, p. 63 [Ed. 8vo., 1842]; *Cosins'* Works, vol. v. pp. 231, 440; Notes on the Prayer Book in *Nicholl's* Commentary, p. 17 [Fo. Ed., 1712], cited in *Collier's* Ecc. Hist., vol. ii. p. 726 [Fo. Ed., 1714]; *Prym's Caterbury's Doom*, pp. 50, 62, 63, and the account there given of Dr. *Donne's* Sermon preached on Candlemas Day, 1640. Sermons, p. 80, Bishop *Andrews'* Chapel; all of which authorities are contained in the *Hierurgia Anglicana* (1), from all which we contend that there is no legal authority for the use of lights at the celebration of the Holy Communion, and that the decree of the Court below is erroneous in not admonishing and enjoining the Respondent to discontinue the use of them. We rely also on the Liturgies of King *Edward* VI., *Cardwell's* Liturgies, and the various Injunctions, Visitations, and Articles, from the year 1561 to 1730 (2).] And we submit, lastly, that having established the charges alleged against the Respondent, the Court below ought to have given the Appellant the costs of the suit.

Mr. *W M. James*, Q.C., and Dr. *Deane*, Q.C. (with them Mr. *Prideaux*, Q.C., Dr. *Tristram*, and Mr. *E. Charles*), for the Respondent:—

We maintain that the judgment of the learned Dean of the Arches on the two points now on appeal is correct, and ought not to be interfered with. The elevation of the Elements, and the alleged prostration of the Appellant, are one and the same offence, and the Respondent having of his own accord discontinued the elevation the grounds of the charge have ceased. The kneeling at improper seasons, of which the Respondent is accused, has reference only to the prostration before the consecrated Elements, and cannot be maintained as a separate charge. The other offence charged against him is the use of lighted Candles during the cele-

(1) Edited by the Rev. *John Fuller Russell*, 8vo. Lond. 1868.

(2) These are collected in the Appendix E. to the 2nd Rep. of the Royal Commissioners on Ritual.

bration of the Holy Communion. But Candlesticks on the Communion Table have been already declared legal by this Tribunal: *Westerton* v. *Liddell* (1); and allowable within the terms of the Rubric relating to Ornaments, the using them by placing lights in them cannot, therefore, be an offence against the Ecclesiastical Laws, unless it could be shewn that some special signification was intended which is contrary to Ecclesiastical Law; no such signification is alleged or proved, and we insist that the learned Judge below has rightly held them to be legal and allowable by the Injunctions of *Edward* VI. of 1547. For their Ecclesiastical History, and the modifications they have undergone, as well as their use, we need only refer to the very elaborate exposition of them in the judgment of the learned Dean of the Arches (2), and we maintain, that being declared legal by the Royal Injunctions of 1547, made pursuant to and by the authority of the *Supremacy Act*, 26 Hen. 8, c. 4, they have not been prohibited or made illegal by any subsequent Statute, or by either of the Acts of Uniformity, 1 Eliz. c. 2, or the 13 & 14 Car. 2, c. 2. There is, however, another ground of objection to this appeal, which, if well founded, is fatal to the Appellant's case. The original proceeding against the Respondent was a criminal proceeding, taken under the *Church Discipline Act*, 3 & 4 Vict. c. 86, penal in its consequences, and, therefore, as the proceeding was taken under a Statute, the offence charged ought to have been alleged as contrary to the Statute: *Francis* v. *Steward* (3). Moreover, the Letters of Request and Citation do not agree with the Articles afterwards exhibited. The former charges the Respondent with bowing, kneeling, or prostrating himself, the latter omits the charge of bowing altogether, and only alleges that the Respondent knelt or prostrated himself. We maintain, that the Citation, which is the indictment in the case, shewed no offence, the bowing or kneeling was, if practised, entirely innocent, the offence, if any, was as alleged in the Articles, which was a new charge, to which the Citation did not point with sufficient certainty. This variation is fatal to the record, and may be taken at any period in the cause. It is, therefore, not too late to urge it now.

(1) Moore's Special Rep. p. 151. (2) Law Rep. 2 A. & E. 224.
(3) 5 Q. B. Rep. 984.

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Mr. *Stephens*, in reply:—

With reference to the objection respecting the discrepancy between the Citation and Articles, it is too late after appearance to the Citation, and praying for Articles, to take such an objection. Appearance waives all objections to the formality of the proceedings: *Prankard* v. *Deacle* (1). The present case is substantially the same as, and is not distinguishable from, *Francis* v. *Steward* (2), relied on by the Respondent. There the party cited appeared under protest. No analogy exists between criminal charges at Common Law and proceedings under 1 Eliz. c. 2, s. 23, which gives jurisdiction to the Ecclesiastical Courts, which is a process for admonition.

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Their Lordships' judgment was deferred, and was now pronounced by

LORD CAIRNS (3):—

The case of *Martin* v. *Mackonochie*, commenced before the Bishop of *London*, was, under the provisions of the *Clergy Discipline Act*, sent by the Bishop to the Court of the Archbishop of *Canterbury* for trial in the first instance; and having been fully heard before the Judge of the Arches Court, resulted in a Decree made on the 28th of March, 1868.

Mr. *Mackonochie*, the Clerk in Holy Orders against whom these proceedings were directed, was charged with four offences against the Laws Ecclesiastical, viz.:—

First, the elevation during or after the prayer of consecration in the Order of the Administration of the Holy Communion of the Paten and Cup; and the kneeling or prostrating himself before the consecrated Elements;

Second, using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles were not wanted for the purpose of giving light;

Third, using incense in the celebration of the Holy Communion;

Fourth, mixing water with the wine used in the administration of the Holy Communion.

(1) 1 Hagg. 185.

(2) 5 Q. B. Rep. 984.

(3) Subsequent to the hearing of the appeal, and before judgment was pronounced, Lord *Cairns* had resigned the Great Seal.

The learned Judge of the Arches Court by his decree sustained the third and fourth of these charges, and admonished Mr. *Mackonochie* to abstain for the future from the use of incense, and from mixing water with the wine, as pleaded in the Articles. Against this part of the decree there is no appeal.

The second charge, as to lights, was not sustained, the learned Judge holding that it was lawful to place two lighted Candles on the Communion Table during the time of the Holy Communion. Against this the Promoter has appealed.

As to the first charge, Mr. *Mackonochie*, while admitting the elevation of the consecrated Elements at the times and in the manner alleged, pleaded that he had discontinued the practice before the institution of the suit. The learned Judge therefore admonished Mr. *Mackonochie* not to recur to the practice; but as to the other part of the charge, namely, the kneeling and prostrating himself before the consecrated Elements, the learned Judge held, that if Mr. *Mackonochie* had committed any error in that respect, it was one which should not form the subject of a criminal prosecution, but should be referred to the Bishop in order that he might exercise his discretion thereon.

The Promoter appeals from the latter part of the decision of the learned Judge on this charge, and he also complains in his appeal that the Defendant was not ordered to pay the costs of the suit.

The questions thus raised by the appeal were very fully and ably argued before this Tribunal, and their Lordships have now to state their reasons for the advice which they propose humbly to offer to Her Majesty.

They will advert first to the charge of kneeling before the consecrated Elements.

It is necessary to refer to the whole of the charge on this head as contained in the third and fourth Articles, although some of the Acts charged are said to have been discontinued before the suit commenced.

These articles run thus:—

"Third. That the said *Alexander Heriot Mackonochie* has in his said Church, and within two years last past (to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866),

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during the prayer of consecration in the Order of the Administration of the Holy Communion, elevated the Paten above his head, and permitted and sanctioned such elevation; and taken into his hands the Cup, and elevated it above his head during the prayer of consecration aforesaid, and permitted and sanctioned the Cup to be so taken and elevated; and knelt or prostrated himself before the consecrated Elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other Clerks in Holy Orders.

"Fourth. That such elevation of the Paten, and such taking and elevation of the Cup, and such kneeling and prostrating, are severally unlawful additions to and variations from the form and order prescribed and appointed by the said Statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other rites and ceremonies of the Church, and are contrary to the said Statutes, and to the 14th, 36th, and 38th of the said Constitutions and Canons, and also to an Act of Parliament passed in a Session of Parliament holden in the thirteenth year of Queen *Elizabeth*, chapter 12, and to the 25th and 28th of the Articles of Religion therein referred to."

Mr. *Mackonochie's* answer to these Articles is as follows:—"Third. Whereas in the third Article given in and admitted as amended in this Cause, it is pleaded that the said *Alexander Heriot Mackonochie* has, to wit—on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year 1866, during the prayer of consecration in the Order of the Administration of the Holy Communion, elevated the Paten above his head, and permitted and sanctioned such elevation, and taken into his hands the Cup and elevated it above his head during the prayer of consecration aforesaid, and permitted and sanctioned the Cup so to be taken and elevated, and knelt or prostrated himself before the consecrated Elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostration by other Clerks in Holy Orders. Now the same is in part untruly pleaded, for the party proponent alleges that whilst he admits that the said *Alexander Heriot Mackonochie* did, on the said two Sundays and on Christmas Day, during the prayer of consecration, kneel, and sanction kneeling by other Clerks

before the Lord's Table, he denies that the said *Alexander Heriot Mackonochie* did on the said two Sundays, and on the said Christmas Day, kneel or prostrate himself before the consecrated Elements, or permit and sanction such kneeling or prostration by other Clerks in Holy Orders, as in the third Article pleaded. And he further alleges, that whilst he admits that he did, on the said two Sundays and Christmas Day, in the said third Article mentioned, elevate, and sanction the elevation by other Clerks, of the Paten and Cup above his head, as is in the said third Article pleaded; yet that such elevation of the Paten and Cup has been wholly discontinued by the said *Alexander Heriot Mackonochie* during the Administration of the Holy Communion ever since the said 30th day of December, 1866, and long prior to the institution of this suit. That such practice was discontinued in consequence of legal advice, and in compliance with the expressed wish of the Lord Bishop of the Diocese of *London*, and with a resolution of Convocation, as was well known to the promoter of this suit before he instituted the same."

Before turning to the evidence in support of this charge, it will be proper to consider an objection which was taken to the Articles, and to the Letters of Request and Citation by which they were preceded.

It was said that although the Articles alleged that the Respondent "knelt or prostrated himself before the consecrated Elements during the prayer of consecration," the Letters of Request and Citation were for "bowing, kneeling, or prostrating himself before the consecrated Elements during or after the prayer of consecration." It was contended that the Citation shewed no offence, for it might be taken, as in an indictment, in the sense most favourable to the accused, and as affirming nothing more than that he bowed after the prayer of consecration, which, it was said, would or might be innocent. And the Articles, it was argued, by omitting this alternative, were a departure from the Citation.

To this it might be sufficient to reply that the objection taken to this Citation—a Citation which, it is not disputed, does contain other charges cognizable by the Ecclesiastical Court—is an objection of a strictly technical character, and one which would be waived by the appearance of the Respondent, as he did appear,

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without protest, and by praying for Articles. But passing from this, it is to be observed that the supposed analogy between the Citation and an Indictment, on which this objection is founded, entirely fails. The *Act of Uniformity*, 1 Eliz. c. 2, contemplates two modes of procedure for enforcing its provisions; one by Indictment, under sect. 4, and the other by process for admonition before the Ordinary under sect. 23; and it is under the latter and not the former section that the present proceedings are taken. Moreover, in the case of an Indictment followed by judgment, the Indictment and judgment become the record, and the judgment is read with reference to the Indictment; and if the Indictment is open to a construction which is innocent, and would not sustain a judgment, the judgment would be vicious and must be arrested; whereas the Citation is followed by Articles, which in turn are met by a plea; and the Court, after hearing evidence, defines by its sentence how much of the charge it considers to be relevant, and to have been proved, and thereby corrects any excess of averment in the citation.

The preliminary objection, therefore, on this charge their Lordships feel themselves obliged to repel.

It is necessary now to examine the evidence adduced in support of the charge; and in doing this, and in considering the character of the charge itself, their Lordships will confine their attention to the conduct and acts of the Respondent as the celebrating or consecrating Minister. The allegations and proof as to "sanctioning and permitting other Clerks" are so vague that no weight could be, and in the argument little weight was attempted to be, given to them.

The chief Witness in support of the charge is Mr. *Beames*. He has not been cross-examined, and no evidence has been adduced for the Respondent. The statement of Mr. *Beames* may, therefore, be taken to be uncontroverted. He speaks of the 23rd and 25th of December, 1866. On both of these occasions the Respondent was the Celebrant at the Communion Service. The effect of the answers of Mr. *Beames* may be stated to be, that the Respondent commenced to read the prayer of consecration standing; that on reaching the words "the same night that He was betrayed," he elevated the Paten above his head, returned it to its place on the Communion Table, and then knelt on his knees towards the Table,

inclining or prostrating his head towards the ground; that he then rose and resumed the prayer; that when, in the further course of the prayer, he took the Chalice, he elevated it above his head as he had done the Paten, replaced it on the Communion Table, and knelt or prostrated himself as before.

The elevation of the Elements has, as already said, been discontinued, and as to the kneeling after the consecration of the Chalice, it might possibly be suggested that it was a kneeling after finishing the prayer of consecration, and with reference to the next part of the service, in which the Celebrant becomes himself the recipient. Omitting, therefore, for the present, the elevation and the second kneeling, the evidence remains, that the Respondent, after commencing the prayer of consecration standing, paused in the middle of the prayer, knelt down, inclining or prostrating his head towards the ground, and then, rising up again, continued the prayer standing.

In order to bring the conduct of the Respondent on this head to the test of Ecclesiastical Law, it is proper now to turn to the Rubric of the Order of the Administration of the Holy Communion.

The Lord's Prayer and the Collect, with which the service commences, are to be said by the Priest "standing at the north side of the table."

The Priest is then to turn to the people and rehearse distinctly all the ten commandments, "the people still kneeling," implying that the Priest is still to stand.

This is to be followed by one of the Collects for the Sovereign, "the Priest standing as before," and by the Collect for the day.

The Priest is then to read the Epistle and Gospel, and to say the Creed, during which no change of attitude is indicated.

After the sermon, when the Priest has returned to the Lord's Table, the sentences of the offertory, the prayer for the Church militant, and the exhortations, are to be "said" by the Priest, without any direction as to change of posture; and then, at the confession, he, as well as all the people, is directed to kneel.

For the absolution and the sentences which follow, the Priest is directed to stand up, and to turn himself to the people; for the words "It is very meet," &c., and the "prefaces," he is to turn to the Lord's Table, and he is then to kneel down at the Lord's

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Table, and, in the name of all the recipients, say the prayer, "We do not presume," &c.

The Rubric before the prayer of consecration then follows, and is in these words:—"When the Priest, standing before the Table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the Cup into his hands, he shall say the prayer of consecration, as follows."

Their Lordships entertain no doubt on the construction of this Rubric that the Priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versâ*; and it appears to them equally certain that the Priest is intended to stand and not to kneel. They think that the words "standing before the Table" apply to the whole sentence; and they think this is made more apparent by the consideration that acts are to be done by the Priest before the people, as the prayer proceeds (such as taking the Paten and Chalice into his hands, breaking the bread, and laying his hand on the various vessels), which could only be done in the attitude of standing.

This being, in their Lordships' opinion, the proper construction of the Rubric, it is clear that the Respondent, by the posture or change of posture which he has adopted during the prayer, has violated the Rubric, and committed an offence within the meaning of the 13 & 14 Car. 2, c. 4, ss. 2, 17, 24, taken in connection with the 1 Eliz. c. 2, and punishable by admonition under sect. 23 of the latter Statute.

It was contended on behalf of the Respondent, that the act complained of was one of those minute details, which could not be taken to be covered by the provisions of the Rubric; that the Rubric could not be considered as exhaustive in its directions, for no order could be shewn in it requiring the celebrating Minister to kneel while himself receiving the bread and wine; and that there was no charge or evidence against the Respondent, that in kneeling after the consecration, any adoration of the sacrament was intended.

Their Lordships are of opinion, that it is not open to a Minister of the Church, or even to their Lordships in advising Her Majesty as the highest Ecclesiastical Tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which ap-

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pear to be trivial. The object of a *Statute of Uniformity* is, as its preamble expresses, to produce "an universal agreement in the public worship of Almighty God," an object which would be wholly frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell*, and their Lordships are disposed entirely to adhere to it: "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted" (1).

There would, indeed, be no difficulty in shewing that the posture of the celebrating Minister during all the parts of the Communion Service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer Book, at and after the Reformation. The various stages of the service are, as has already been shewn, fenced and guarded by directions of the most exact kind, as to standing and kneeling, the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe, that whereas in the first Prayer Book of King *Edward* VI., there was contained at the end a Rubric in these words:—"As touching kneeling, crossing, holding up of hands, knocking upon the breast, and other gestures, they may be used or left, as every man's devotion serveth, without blame:" this Rubric was, in the second Prayer Book of *Edward* VI., and in all the subsequent Prayer Books, omitted.

The argument against the completeness of the directions as to posture, derived from a supposed absence of any order that the Celebrant shall kneel whilst himself receiving, does not appear to their Lordships to be well founded. In the Rubric as to the reception of the sacramental bread and wine, the words "all meekly kneeling," apply, as their Lordships think, to the Celebrant, as well as to other Clerks, and to the people. And this is made more clear by the Rubric termed the Black Rubric, added at the end of the service.

It is true, as was contended, that there is no charge against the Respondent, that the kneeling complained of was intended as

(1) Moore's Special Rep. p. 187.

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an act of adoration of the sacramental elements. Such a charge, involving, as it would, an inquiry into sentiments and feelings, of which no Tribunal can adequately judge, would be difficult of proof; and the Rubrical enactments appear to have been wisely confined to prescribing an order of service free from those outward movements which had become more or less associated with errors in doctrine which, at the Reformation, were renounced. If this order is departed from, it is, as their Lordships think, unnecessary to inquire into the motive by which the departure has been occasioned.

Another argument urged on behalf of the Respondent should also be noticed. Mr. *James* contended, with great ability, that the charge as to kneeling during the prayer of consecration was made in connection with the charge as to the elevation of the sacrament, and that the charge of kneeling was only an aggravation of that of elevation, which had been discontinued. This no doubt is so; but the kneeling under the circumstances described, being itself, as their Lordships think it is, a violation of the Rubric, they do not think that the judgment of the Court should the less be passed upon it because the other part of the charge, namely, that as to the elevation, is no longer resisted.

It only remains, on this part of the case, to advert to the very learned and elaborate judgment of the Dean of the Arches. That learned Judge states, that the Rubric does not give precise directions that the Celebrant should kneel at the times when it appears that the Respondent does kneel; that he is far from saying it is not legally competent to him to adopt this attitude of devotion; and that it cannot be contended that at some time or other he must not kneel during the celebration, although no directions as to his kneeling at all are given by the Rubric.

Their Lordships, however, think, as they read the Rubric, that directions as to the Celebrant kneeling at a particular time of the celebration, namely, when he himself receives the sacrament, are given; and that at the time when it appears that the Respondent kneels, namely, during the prayer of consecration, the directions in the Rubric are precise that he should stand and not kneel.

The learned Judge further observes, that if Mr. *Mackonochie* has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the

category of cases which should be referred to the Bishop. This category the learned Judge had previously defined to be—"Things neither ordered nor prohibited expressly or by implication, but the doing or use of which must be governed by the living discretion of some person in authority."

And as to cases in this category, the learned Judge considered that, according to the preface to the Prayer Book, "the parties that doubt or diversely take anything should always resort to the Bishop of the Diocese."

Their Lordships do not think it necessary to consider minutely the cases to which, or the manner in which, this direction in the preface to the Prayer Book is applicable, inasmuch as, in their opinion, the charge against the Respondent, with which they are now dealing, involves what is expressly ordered and prohibited by the Rubric, and is, therefore, a matter in which the Bishop could have no jurisdiction to modify or dispense with the rubrical provisions.

On the whole, their Lordships are of opinion, that the charge against the Respondent of kneeling during the prayer of consecration has been sustained, and that he should be admonished, not only not to recur to the elevation of the Paten and the Cup as pleaded in the third Article, but also to abstain for the future from kneeling or prostrating himself before the Consecrated Elements during the prayer of consecration, as in the same Article also pleaded.

The other charge involved in this appeal is that of using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles are not wanted for the purpose of giving light.

This charge is contained in the fifth and sixth Articles, which are as follows:—"Fifth. That the said *Alexander Heriot Mackonochie* has in his said Church, and within two years last past, to wit, on Sunday the 23rd day of December, on Christmas Day last past, on Sunday, the 30th day of December, all in the year of our Lord, 1866, and on Sunday, the 13th day of January, in the year of our Lord 1867, used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted Candles."

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Sixth. That the use of such lighted Candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said Statutes, and by the said Book of Common Prayer, and Administration of the Sacraments, and other rites and ceremonies of the Church, and is contrary to the said Statutes, and to the 14th, 36th, and 38th of the said Constitutions and Canons.

The responsive plea of Mr. *Mackonochie*, on this head, is as follows:—"Fifth. Whereas, it is pleaded in the fifth Article that the said *Alexander Heriot Mackonochie* has, in his said Church, and within two years last past, to wit, on Sunday, the 23rd day of December, on Christmas Day last past, and on Sunday, the 30th day of December, all in the year of our Lord 1866; and on Sunday, the 13th of January, in the year of our Lord 1867, used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted Candles. Now the same is in part untruly pleaded, for the party proponent alleges that on the said three Sundays and Christmas Day, in the said fifth Article mentioned, the said lighted Candles were not placed on the Communion Table, but upon a narrow moveable ledge of wood resting on the said Table, and that the said Candles were so placed and kept lighted, not during the celebration of the Holy Communion only, as falsely suggested in the said fifth Article, but also during the whole of the reading of the Communion Service, including the epistle and gospel, and during the singing after the reading of the Nicene Creed, and during the delivery of the sermon.

"Sixth. That he denies that the use of such lighted Candles is an unlawful addition to and variation from the form and order prescribed and appointed by the said Statutes, and by the said Book of Common Prayer and Administration of the Sacraments, and other rights and ceremonies of the Church, and is contrary to the said Statutes, and to the 14th, 36th, and 38th of the said Constitutions and Canons, as in the said sixth Article alleged."

The facts, therefore, on this part of the case, appear to be, that the Respondent uses two lighted Candles during, with reference to, and as an accompaniment of, the Communion Service, and not for the ordinary purpose of giving light, and that these Candles are

placed on a ledge of wood which is placed on the Communion Table.

The Dean of the Arches seems to have considered that all the practices complained of before him, including this use of lighted Candles, were ceremonies. The Respondent, in the argument of his Counsel at the Bar, appeared to prefer to treat the question as one of ornament, and Mr. *James* said he considered the lighted Candles "part of the symbolical decoration of the Altar."

If it were necessary to decide which of these views is correct, their Lordships would feel disposed to agree with the Dean of the Arches, that however Candles and Candlesticks may *per se* be looked upon as a part of the furniture or ornaments of the Church, taking the word "Ornaments" in the larger sense assigned to it by this Committee in *Westerton* v. *Liddell* (1), yet the lighting of the Candles, and the consuming them by burning throughout, and with reference to a service in which they are to act as symbols and illustrations, is itself either a ceremony, or else a ceremonial act forming part of a ceremony, and making the whole ceremony a different one from what it would have been had the lights been omitted.

The Council of *Trent* (22nd Session, 5th chapter), *De Missæ Ceremoniis et Ritibus*, says: "*Ceremonias item adhibuit ut mysticas benedictiones, lumina, thymiamata, vestes, aliaque multa.*"

Dr. *Donne* also, in his Sermons (p. 80, Fol. Ed. 1640), writing in support of the use of these lights, calls it a ceremony. He says: "It is in this ceremony of lights as it is in other ceremonies."

There is a clear and obvious distinction between the presence in the Church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candlestick may be parts of the furniture or ornaments of a Church; but the censing of persons and things, or, as was said by the Dean of Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist, the symbolical use of water in Baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle: these acts give a life and meaning to what is otherwise

(1) Moore's Special Rep. at p. 156.

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inexpressive, and the act must be justified, if at all, as part of a ceremonial law.

If the use of lighted Candles in the manner complained of be a ceremony or ceremonial act, it might be sufficient to say that it is not—nor is any ceremony in which it forms a part—among those retained in the Prayer Book, and it must therefore be included among those that are abolished; for the Prayer Book, in the Preface, divides all ceremonies into these two classes: those which are retained are specified, whereas none are abolished specifically or by name; but it is assumed that all are abolished which are not expressly retained.

Passing however from this, the use of lighted Candles, if a ceremonial act or part of a ceremony, would be prohibited by Queen *Elizabeth's Act of Uniformity*, 1 Eliz. c. 2, s. 4, which is now applicable to the present Prayer Book, and which makes it penal to "use any other right, ceremony, order, form, or manner of celebrating the Lord's Supper . . . than is mentioned and set forth in the said Book: and any prior authority for the practice, from usage or otherwise, would be avoided by sect. 27, which enacts that "all Laws, Statutes, and Ordinances, whereby any other service, administration of sacraments, or Common Prayer, is limited, established, or set forth to be used within this realm, shall from henceforth be utterly void and of none effect."

As to the argument that the use complained of is at most only part of a ceremony, their Lordships are of opinion that when a part of a ceremony is changed, the integrity of the ceremony is broken, and it ceases to be the same ceremony.

The learned Judge of the Arches Court was of opinion, that these lights were ordered by injunctions having statutable authority, which injunctions had not been directly repealed; that they were primitive and Catholic in their origin, Evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the Church, and that, therefore, it was lawful to place them on the Holy Table during the time of the Holy Communion "for the signification that Christ is the very true light of the world."

The authorities cited shew beyond all doubt the very ancient and general use in the Church of these symbolical lights; and the

injunction to which the learned Judge refers, is the third of those issued, A.D. 1547, in the first year of the reign of King *Edward* VI. By this it was ordered that images should be taken down and destroyed, and that spiritual persons should suffer no torches or candles to be set afore any image or picture, but only two lights upon the High Altar, before the Sacrament, which, for the signification that Christ is the very true light of the world, they should suffer to remain.

It would deserve consideration how far under any circumstances this injunction could now be held operative, having regard to the words "upon the High Altar, before the Sacrament," and to the distinction pointed out by this Committee in *Westerton* v. *Liddell* (1), and *Parker* v. *Leach* (2), between the Sacrificial Altar and the Communion Table. But without dwelling on this, and without stopping at this place to inquire into the nature of the authority under which the Injunctions of 1547 were issued, their Lordships are clearly of opinion that the injunction in question, so far as it could be taken to authorize the use of lights as a ceremony or ceremonial act, was abrogated or repealed by the Act, 1 Eliz. c. 2, particularly by sect. 27 already mentioned, and by the present Prayer Book and *Act of Uniformity*, and that the use of lighted Candles, viewed as a ceremony or ceremonial act, can derive no warrant from that injunction.

Reference was made in the argument for the Respondent to a Constitution of the Council of *Oxford*, under *Walter*, Archbishop of *Canterbury*, A.D. 1322. That Constitution is in these words:— "*Tempore quo missarum solemnia peraguntur, accendentur duæ candelæ, vel ad minus una;*" and is apparently a repetition of the earlier Constitution of A.D. 1222 (*Wilkins, Concilia*, vol i. p. 595): "*Tempore quo missarum solemnia peraguntur, accendentur duæ candelæ, vel ad minus una cum lampade.*" As to these Constitutions it is sufficient to say that, in their Lordships' opinion, they must be taken, if of force at the time of passing of any of the Acts of Uniformity, to have been repealed by those Acts.

It remains to be considered whether the use of these two lighted Candles can be justified as a question of "Ornaments" according to the definition of that term already referred to. It was in this

(1) Moore's Special Rep. pp. 176, 184. (2) 4 Moore's P. C. Cases (N.S.) 199.

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sense that the argument for the Respondent appeared to prefer to regard them; and the learned Judge of the Arches Court also, although, at the earlier part of his judgment, he had stated that the matters complained of before him must be considered as "ceremonies," appears ultimately to have applied to the use of the lighted Candles the law or rubric as to Ornaments.

The Rubric or note as to Ornaments, in the commencement of the Prayer Book, is in these words:—

"And here it is to be noted that such Ornaments of the Church, and of the Ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of *England*, by the authority of Parliament, in the second year of the reign of King *Edward* the VIth."

3 Ad. E. 89
4 Ad. E. 217
1 P.D. 375-6

The construction of this Rubric was very fully considered by this Committee in the case of *Westerton* v. *Liddell*, already referred to; and the propositions which their Lordships understand to have been established by the judgment in that case may thus be stated:—

First, the words "authority of Parliament" in the Rubric refer to and mean the Act of Parliament 2 & 3 Edw. 6, c. 1, giving Parliamentary effect to the first Prayer Book of *Edward* VI., and do not refer to or mean Canons or Royal Injunctions, having the authority of Parliament, made at an earlier period (1).

Second, the term "Ornaments" in the Rubric means those articles, the use of which, in the services and ministrations of the Church, is prescribed by that Prayer Book (2).

Third, the term "Ornaments" is confined to these articles (3).

Fourth, though there may be articles not expressly mentioned in the Rubric, the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services: as an organ for the singing, a credence Table from which to take the sacramental bread and wine, cushions, hassocks, &c. (4).

In these conclusions, and in this construction of the Rubric, their Lordships entirely concur, and they go far, in their Lordships' opinion, to decide this part of the case.

(1) Moore's Special Rep. p. 160.
(2) Ibid. p. 156.
(3) Moore's Special Rep. p. 156.
(4) Ibid. p. 187.

The lighted Candles are clearly not "Ornaments" within the words of the Rubric, for they are not prescribed by the authority of Parliament therein mentioned, namely, the First Prayer Book; nor is the Injunction of 1547 the authority of Parliament within the meaning of the Rubric. They are not subsidiary to the service, for they do not aid or facilitate—much less are they necessary to—the service; nor can a separate and independent Ornament, previously in use, be said to be consistent with a Rubric which is silent as to it, and which by necessary implication abolishes what it does not retain.

It was strongly pressed by the Respondent's Counsel that the use of lighted Candles up to the time of the issue of the first Prayer Book was clearly legal; that the lighted Candles were in use in the Church in the second year of *Edward* VI.; and that there was nothing in the Prayer Book of that year making it unlawful to continue them. All this may be conceded, but it is in reality beside the question. The Rubric of our Prayer Book might have said: Those Ornaments shall be retained which were lawful, or which were in use in the second year of *Edward* VI., and the argument as to actual use at the time, and as to the weight of the Injunction of 1547, might in that case have been material. But the Rubric, speaking in 1661, more than a hundred years subsequently, has, for reasons which it is not the province of a Judicial Tribunal to criticize, defined the class of Ornaments to be retained by a reference, not to what was in use *de facto*, or to what was lawful in 1549, but to what was in the Church by authority of Parliament in that year; and in the Parliamentary authority which this Committee has held, and which their Lordships hold, to be indicated by these words, the Ornaments in question are not found to be included.

Their Lordships have not referred to the usage as to lights during the last three hundred years; but they are of opinion that the very general disuse of lights after the Reformation (whatever exceptional cases to the contrary might be produced), contrasted with their normal and prescribed use previously, affords a very strong contemporaneous and continuous exposition of the law upon the subject.

Their Lordships will, therefore, humbly advise Her Majesty that

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the charge as to lights also has been sustained, and that the Respondent should be admonished for the future to abstain from the use of them, as pleaded in these Articles.

All the charges against the Respondent having been thus established, their Lordships see no reason why the usual consequence as to costs should not follow; and they will advise Her Majesty that the Respondent should pay to the Appellant the costs in the Court below, and of this appeal.

3 P C 53-4 62.

By an Order of Her Majesty in Council made thereon it was ordered "that the decree of the Court below ought to be amended to the extent hereinafter mentioned, the principal cause retained, and therein that, in addition to the matters in which the said *Alexander Heriot Mackonochie* was in the decree appealed from pronounced to have offended, and from which he was thereby monished to abstain for the future, he, the said *Alexander Heriot Mackonochie,* ought to be pronounced to have offended against the Statutes, Laws, Constitutions, and Canons of the Church of *England* by having, within the said Church of the new parish of *St. Alban's, Holborn,* knelt or prostrated himself before the consecrated Elements during the prayer of consecration, and also by having within the said Church used lighted Candles on the Communion Table during the celebration of the Holy Communion, at times when such lighted Candles were not wanted for the purpose of giving light; and that the said *Alexander Heriot Mackonochie* ought to be admonished to abstain for the future from kneeling or prostrating himself before the consecrated Elements during the prayer of consecration, and also from using in the said Church lighted Candles on the Communion Table during the celebration of the Holy Communion at times when such lighted Candles are not wanted for the purpose of giving light; and, further, that he, the said *Alexander Heriot Mackonochie,* ought to be condemned in the costs incurred on behalf of the said *John Martin* as well in the Court below as in the appeal."

Proctors for the Appellant: *Moore & Currey.*
Proctor for the Respondent: *G. H. Brooks.*

ALEXANDER RODGER, CHARLES CARNIE, AND RICHARD JAMES GILMAN . . . . } APPELLANTS;

AND

THE COMPTOIR D'ESCOMPTE DE PARIS, AND THE CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA . . . . . } RESPONDENTS.

J. C.*
1869
Feb. 4, 5.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Vendor and Purchaser—Stoppage in transitu—Bills of lading—Insolvency of Vendees—Deed of Assignment—Construction—Ambiguity—Double intendment—Transfer of goods by indorsement—Consideration—Antecedent debt.

The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a Bill of lading, so as to defeat an unpaid Vendor's right of stoppage *in transitu*.

L. & S., carrying on business in *London* and *Hong Kong*, bought goods of *L.* and others, Merchants at *Manchester*, to be shipped to their firm at *Hong Kong*. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from *Hong Kong* to meet the acceptances of *L. & S.* given for the price of the goods, on receipt of the Bills of lading. *L. & S.* contracted for the carriage, and shipped the goods in a Vessel they engaged, and the Bills of lading deliverable to their Firm in *Hong Kong*, or their assigns, were signed by the Master and handed over to *L. & S.*, who accepted the draft of the Vendors for the amount of the purchase. Before the goods or Bills of lading reached *Hong Kong*, *L. S. & Co.*, being insolvent, and pressed by two Banking Firms at *Hong Kong*, to whom they were largely indebted, in consideration of their debt to the Bank assigned to them the "whole of their property, premises, and chattels, specified in a schedule thereto, with all the estate, right, title, interest, claim, or demand of *L. S. & Co.*, arising thereout or therefrom." The schedule, *inter alia*, enumerated "All goods and Bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the Bills of lading were indorsed and handed over to the Banking Firms, to whom the insolvent circumstances of *L. S. & Co.* at that time were well known:—

Held: First, that pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid Vendors to stop the goods *in transitu*, and

Second, that the *transitus* had not ended before the arrival of the goods at *Hong Kong*, as the *transitus* continued while the goods were in charge of a third party, contracted with as Carrier for the purpose of forwarding them.

Where words in an assignment, or deed, are capable of two constructions,

* *Present:*—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER.

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they are to be construed strongly against the party who uses them to work a wrong.

An Assignee of any security stands in the same position as the Assignor as to the equities arising upon it. The case of a Bill of Exchange is exceptional, and is to be dealt with on special grounds.

THIS was an action of Trover brought by the Respondents, two Banking Firms at *Hong Kong*, against the Appellants, the Owners of a Vessel called the "*Min.*" The ground of the action was, that the Appellants had refused to deliver to the Respondents three parcels of goods purchased by a Firm carrying on business in *London* under the style of "*Lyall & Still,*" and at *Hong Kong* under the style of "*Lyall, Still, & Co.,*" of three *Manchester* Firms; one parcel of Messrs. *Liebert & Co.*, another parcel of *Samuel Mendel*, and the third parcel of Messrs. *Calvert & Co.* The goods had been shipped by the order and direction of *Lyall & Still* in *London*, on board the *Min*, a vessel they engaged for *Hong Kong*, deliverable, according to the Bill of lading, to *Lyall, Still, & Co.*, or their assigns, at *Hong Kong*. The Respondents were indorsees and holders of the Bills of lading.

The Appellants pleaded, first, a denial of the conversion of the goods; and secondly, a denial that the goods were the Respondents; on which pleas issue was joined.

The cause was tried before the Chief Justice, the Hon. *John Smale*, and a special jury.

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It appeared on the Chief Justice's notes of the evidence, that the goods in question were purchased from Merchants at *Manchester* in the autumn of 1866 by *George Lyall* and *Charles Frederick Still*, of *London*, for their firm at *Hong Kong*, which traded there under the style of *Lyall, Still, & Co.* Mr. *George Frederick Maclean* was the resident partner and Manager at *Hong Kong*.

One parcel of these goods was purchased from *B. Liebert & Co.*, on a ten months' credit, which was the usual course in such transactions as between *Manchester* and *Hong Kong* Merchants.

It was part of the Contract that remittances of proceeds of sales should be made from *Hong Kong*, to meet the acceptances of *George Lyall* and *Charles Frederick Still*, given for the price of the goods, on receipt of the Bills of lading.

The second parcel was purchased from *Samuel Mendel* on a nine months' credit, with a stipulation of a similar character as to remittances.

The third parcel was purchased from *Calvert & Co.* on a six months' credit, without any special stipulation.

The object of the long credit was to give ample time for realizing proceeds, so as to make remittances according to agreement.

When the time arrived for forwarding the goods from *Manchester*, *Lyall & Still*, of *London*, employed *Killick, Martin, & Co.*, as Shipping Agents there, to secure tonnage in the *Min*, which was then in the berth for *Hong Kong*. When this was secured, *Lyall & Still* directed the Vendors at *Manchester* to forward the goods to *Killick, Martin, & Co.*, for shipment in the *Min*, and they also directed *Killick, Martin, & Co.* to receive the goods so to be forwarded to them simply for the purpose of the shipment. In accordance with these instructions the goods were packed and marked at *Manchester* ready for shipment, and were sent up to *Killick, Martin, & Co.*, with whom *Lyall & Still* had contracted for the carriage from *Manchester* to *Hong Kong*. All the charges were included in one through freight.

The goods were shipped on board the *Min;* Bills of lading for them, deliverable to *Lyall, Still, & Co.*, or their assigns, were signed by the Master, and were handed over to *Lyall & Still*, who accepted the draft of the Vendors for the price in each case.

Before this transaction the Firm at *Hong Kong* was in a failing condition; their deficit was about four lacs of dollars, and in November, 1864, their condition had not improved. At the end of November and beginning of December, *Maclean* had Bill transactions with the Respondents (two Banking Firms at *Hong Kong*), by which he got large advances on the undertaking to furnish shipping documents for silk cargoes, to be ready for the mail of the 15th of December from *Hong Kong*.

On the 13th of December the transactions of the Firm were at a stand; they had ceased to make purchases or shipments of tea or silk as theretofore; they were under the necessity of returning Bills of their correspondents, and had refused payment of their acceptances to the amount of $150,000. This was well known at the time in *Hong Kong*.

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On the 14th of December, Mr. *Kaiser*, the Manager of one of the two Banks, addressed a Letter to *Lyall, Still, & Co.*, requiring them to furnish, in the course of the day, the shipping documents according to their undertaking; to which *Maclean* replied that they were unfortunately unable to comply with this request.

On the 17th, *Kaiser* wrote another Letter, insisting on getting the documents, or a return of the advance made on the faith of the undertaking to furnish them, and he concluded his Letter in these words:—"I must ask your immediate attention to this matter, and beg to warn you that my now offering to receive back the money obtained by you must not be looked upon as in any way binding me to treat the matter as one of debt, as I shall hold myself perfectly at liberty to deal with the matter as one of a much more serious character than a mere debt, if it be not at once satisfactorily arranged.

Mr. *Kaye*, the Manager of the other Bank, had had a conversation with Mr. *Maclean* in reference to the refusal of *Lyall, Still, & Co.* to pay their acceptances. He also became impatient and urgent for an arrangement, on account of the advance made by his Bank. The two Banks then combined, and *Maclean* was pressed, as he could not give them the documents he promised, to give them all he had.

He was asked, what can you give us? He made out a memorandum, which he handed to Mr. *Pollard*, the Counsel for the Banks, in order that he might prepare a formal assignment. This was prepared, and was executed, on the 22nd of December, 1866, by *Maclean* in the name of the Firm, which was at that time insolvent, with liabilities uncovered to the amount of eight lacs of dollars.

The assignment stated the consideration of it to be, first, a debt of $85,714. 28c. owing by *Lyall, Still, & Co.* to one of the Banks, and of $50,000 to the other; next, the agreement to furnish Bills and shipping documents, upon the faith of which the advances were made, which constituted the debts to the Banks and the release of all claim upon the part of the Banks in respect of that agreement. It then proceeded to make over to the Banks "the whole of the property, premises, and chattels specified in the schedule at the foot, with all the estate, right, title, interest, claim, or demand of

Lyall, Still, & Co. therein or thereto, or arising thereout or therefrom." It further provided for doing all acts that might be required to give full and formal effect for securing and perfecting the assignment.

In the schedule, the first item was a share in the *Hong Kong Club*. There were other items of shares in various Insurance Companies, an equity of redemption, and two items in these words:—"All goods and Bills of lading or other documents for all goods now on the way hither to arrive in December, 1866, or January, 1867." "All goods or documents for goods alluded to in a telegram dated the 9th of November, 1866, from *London* partners to *Hong Kong* firm, received by Steamer *Clan Alpine, viâ Calcutta*, in the words, 'are shipping more goods; shirtings thirteen six, shipment remitted;' and all goods or documents for goods purchased and shipped, and now on the way hither."

The documents arrived on the 27th of December, 1866, and the 1st of January, 1867, including the Bills of lading for the goods shipped in the *Min*. These were indorsed, and handed over by *Maclean* (together with the policies on the goods) to Mr. *Kaiser*, in performance of the agreement contained in the assignment.

After the arrival of the *Min* at *Hong Kong* a demand was made on the part of the unpaid Vendors, by persons authorized on their behalf, to claim possession of the goods, and this demand was acceded to on behalf of the Owners of the *Min*. Subsequently the Respondents, as transferees and holders of the Bills of lading, made a like demand, which was refused, and the present action was then brought.

The jury found a verdict for the Respondents, with $11,123. 50c. damages as to *Liebert's* goods; as to *Mendel's* goods, $35,187. 50c.; and as to *Calvert's* goods, $9,500, and interest thereon.

The Appellants moved to set aside the verdict, and, instead thereof, that a nonsuit should be entered, or a new trial had, on the following grounds: first, that there was no valuable consideration for the transfer of the three Bills of lading, so as to defeat the right of stoppage *in transitu;* second, that *Lyall, Still, & Co.*, in *Hong Kong*, were entrusted with *Liebert's* and *Mendel's* Bills of lading as Agents within the meaning of the *Factors Acts*, and that the Bills of lading were transferred to secure an antecedent debt,

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and the transfer was, therefore, invalid under the *Factors Acts;* third, that the Bills of lading (if not intrusted to *Lyall, Still, & Co.* in *Hong Kong* as Agents within the meaning of the *Factors Acts*) did not come to their hands as absolute Owners, but subject to certain trusts for sale, and for the specific appropriation of the proceeds thereof, and that they had no power to transfer the same to the Plaintiffs as a security for an antecedent debt; fourth, for misdirection by the Judge on the above three points; fifth, for misdirection as to constructive or implied notice, arising from knowledge of the course of trade, and in directing the jury that the Bills of lading alone could be looked to for the purpose of affecting third parties with notice of private arrangements incident to a sale; sixth and seventh, improper reception of evidence of two witnesses, named *Bottomley* and *Duncanson;* and, lastly, that the verdict was against the weight of evidence.

On the 29th of June, 1867, the Court refused the motion with costs (1). Hence this appeal.

Sir *R. Palmer*, Q.C., and Mr. *Manisty*, Q.C. (Mr. *Baylis*, with them), for the Appellants:—

There was no valuable consideration for the transfer of the three Bills of lading, so as to defeat the right of stoppage *in transitu* by the unpaid Vendors. *Haille* v. *Smith* (2) is an analogous case to the present. There *A.*, of *Liverpool*, wishing to drawn upon a Banking House of *B.*, in *London*, to a large amount, agreed, among other securities given, to consign goods to a mercantile House consisting of the same partners as the Banking House, though under the Firm of *B. & C.;* accordingly, he remitted the invoice of a cargo and the Bill of lading indorsed in blank to *B. & C.*, but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became Bankrupt, being considerably indebted to *B.*, and the cargo was delivered to his Assignees by the Captain; and it was held, that *B. & C.* could maintain trover for it against the Captain. *Mason* v. *Lickbarrow* (3) is the leading case on the doctrine of stoppage *in transitu.* It was there held by Lord *Loughborough* (4), who referred

(1) No reasons for the judgment accompanied the Judge's notes, nor were their Lordships furnished with any copy of the judgment; but a report of the case in a Colonial newspaper was agreed upon by both sides as correct, and referred to in the argument.

(2) 1 B. & P. 563.

(3) 1 H. Bl. 363; S. C. 2 T. R. 63.

(4) 1 H. Bl. 358.

to *Cooper* v. *Andrews* (1), and the Year Book there cited, that the title of a Vendor is never entirely divested till the goods have come into the possession of the Vendee, and that the Vendor has a complete right, for just causes, to retract the intended delivery, and to stop the goods *in transitu: Vertue* v. *Jewell* (2); *Cuming* v. *Brown* (3); *Gurney* v. *Behrend* (4). In equity, a transfer of goods for valuable consideration by a Consignee for a limited purpose does not destroy the Consignor's right of stoppage *in transitu, ultrà* the particular lien of the transferee: *Spalding* v. *Ruding* (5).

Lyall, Still, & Co., in *Hong Kong*, were entrusted with *Liebert's* and *Mendel's* Bills of lading as Agents within the meaning of the Factors Acts, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, ss. 1, 3: *Gobind Chunder Sein* v. *Ryan* (6); and as the Bills of lading were transferred to secure an antecedent debt, the transfer was invalid under those Acts: *Macnee* v. *Gorst* (7). A party receiving *East India* warrants from a Factor, in pledge for moneys advanced, cannot retain them against the true owner, if, from circumstances, he must, as a reasonable man, know them not to belong to the Factor, although no direct communication of that fact was made to him: *Evans* v. *Trueman* (8). If the Bills of lading were not entrusted to *Lyall, Still, & Co.*, in *Hong Kong*, as agents within the meaning of the Factors Acts, they did not come to their hands as absolute owners, but subject to certain trusts for sales, and for the specific appropriation of the proceeds thereof. In *Ex parte Copeland* (9) Bills for the amount of goods were given to be renewed till the return of the proceeds were received; and it was held, that the proceeds were clothed with a trust for payment of the Bills. *Ex parte Prescott* (10) is to the same effect. *Lyall, Still, & Co.* had no power to transfer the same to the Respondents as security for an antecedent debt. *Mangles* v. *Dixon* (11) is in point. In that case the House of Lords determined that an assignee of a chose in action, or security of any kind, where there has been no fraud, stands in exactly the same situation as to the equities upon it, and he must be taken to be cognizant of them, and it is his duty

(1) 1 Hob. 41.
(2) 4 Camp. 31.
(3) 9 East, 514.
(4) 3 E. & B. 622.
(5) 6 Beav. 376.
(6) 15 Moore's P. C. Cases, 230.
(7) Law Rep. 4 Eq. 315.
(8) 2 B. & A. 886; S. C. 1 M. & R. 10.
(9) 3 Dea. & Ch. 199.
(10) Ibid. 218.
(11) 3 H. L. C. 702.

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to make inquiries, and if a loss arises it falls upon him whose duty it is to make inquiries.

The learned Judge misdirected the jury in respect to constructive or implied notice arising from knowledge of the course of trade, and in directing the jury that the Bills of lading alone could be looked to for the purpose of affecting third parties with notice of private arrangements incident to a sale. According to the true construction to be put upon the agreement of the 22nd of December, 1866, in pursuance of which the Bills of lading were indorsed to the Respondents by *Lyall, Still, & Co.*, only a qualified interest in the goods, subject to prior rights, which included the possible right of stoppage *in transitu*, was intended to be passed. If any doubt exists, it must be presumed against the transferees. The rule is thus stated in *Sheppard's* Touch. (1), that "If words may have a double intendment, and the one standeth with law, and the other is against law, that it be taken in that sense which is agreeable to law, and, therefore, if tenant in tail make a lease of land to *B.* for term of life, and do not mention for whose life it shall be, this shall be taken for the life of the lessor, and not for the life of the lessee [as it shall be if such lease be made by tenant in fee simple]." And the same principle is recognised in Courts of Equity. Thus, in *Whitworth* v. *Gaugain* (2), Sir *James Wigram* says: "There is no principle upon which a Court of Justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the Debtor;" and this case was confirmed on appeal by Lord *Cottenham* (3). It is clear, therefore, that under the circumstances in which the indorsement was made by *Lyall, Still, & Co.* to the Respondents, and the consideration for which it was made, even assuming that it was intended to pass an absolute property, rendered it ineffectual against an unpaid Vendor. The verdict, moreover, was against the weight of evidence.

Mr. *Mellish*, Q.C., and Mr. *Kay*, Q.C. (Mr. *Hall* with them), for the Respondents:—

At the time when the Vendors stopped the goods they were not *in transitu*, as the goods had been delivered in *London* to the

(1) Ch. v. p. 88 [Ed. by Preston]. (2) 3 Hare, 428.
(3) 1 Phil. 728.

Agents of *Lyall & Co.*, and there shipped by order and on account of that Firm on board a Vessel engaged by them, and the Bills of lading, under their directions, made out and delivered to them for the delivery of the goods to their Firm at *Hong Kong*, or assigns. There was, therefore, an actual or constructive delivery in *London* to the Purchasers, which determined the right to stop *in transitu*. *Lyall & Co.* having taken the goods into their own possession, and having shipped them as their own, with an invoice from themselves to the *Hong Kong* branch of their Firm, they determined the Vendors' right of stoppage *in transitu*. With respect to the goods which were bought of *Mendel & Co.*, the evidence on this point shews that the goods were purchased on account of *Lyall & Co.*, of *London*, and were invoiced to them only.

The Respondents were *bonâ fide* and without notice transferees for valuable consideration of the Bills of lading, therefore, the Vendor's right to stop the goods *in transitu* was, in the circumstances, defeated. *The Marie Joseph* (1) is an authority in our favour. There it was held by this Court, that a Bill of lading for the delivery of goods to order and assigns is a negotiable instrument which, by indorsement and delivery, passes the property in the indorsee, subject only to the right of the unpaid Vendor to stop *in transitu*, and that an indorsee could deprive the Vendor of that right by indorsing the Bill of lading for valuable consideration, although the goods were not paid for, and even if Bills had been given which were certain of being dishonoured, provided the indorsee for value had acted *bonâ fide* and without notice, which is the case here. It ought to have been clearly established in evidence, that at the time of the agreement of the 22nd of December, 1866, it was known to the Respondents that there were unpaid Vendors, having a right of stoppage *in transitu*, to make the assignment to the Respondents by *Lyall, Still, & Co.* fraudulent. That is the result of the authorities: *Lickbarrow* v. *Mason* (2); *Cuming* v. *Brown* (3); *Jones* v. *Smith* (4); *Raphael* v. *The Bank of England* (5); *Jones* v. *Jones* (6).

It is clear, that Messrs. *Lyall & Co.* were not Factors, and did not come within the *Factors Acts*, 6 Geo. 4, c. 94, and 5 & 6 Vict. c. 39, ss. 1, 3, but the *bonâ fide* Owners of the goods; for

(1) Law Rep. 1 P. C. 219.
(2) 2 T. R. 63; and see 1 Sm. L. C. p. 699 [6th Ed.]
(3) 9 East, 506.
(4) 1 Hare, 43.
(5) 17 C. B. 161.
(6) 8 M. & W. 431.

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first, with respect to *Mendel* and *Calvert's* goods, the fact that they drew, and Messrs. *Lyall & Co.* accepted, Bills for the price of these goods, including interest during their currency, and commission, that the insurance and freight of the goods were paid by them, and the goods re-invoiced by them to the *Hong Kong* branch of their Firm; shews that they took and dealt with those goods as Owners, and that the goods were consigned to *Lyall, Still, & Co.* at their own risk as Purchasers, and not as Factors. With respect to *Mendel & Co.'s* goods, the invoices thereof, stating that those goods had been bought on account and for the risk of Messrs. *Lyall & Co.* of *London*, and the fact that they were paid for by drafts drawn by the Vendors on, and accepted by, *Lyall & Still*, including interest and commission, as in *Liebert's* case, shews that these goods also were consigned to *Lyall, Still, & Co.* at their own risk as purchasers, and not as Factors.

Then with respect to the trust to which *Liebert's* and *Mendel's* goods are alleged to have been subject, the stipulations as to the remission of the proceeds of the goods to meet the drafts accepted for the price thereof, was a mere term of the Contracts for those goods, but did not under the circumstances affect the goods with any trust or equitable lien. Moreover, the Respondents became Assignees of the goods and Indorsees of the Bills of lading *bonâ fide*, for valuable consideration, and without notice of any trust or equitable lien affecting the goods; such trust or equitable lien, therefore, if any existed, could not over-reach the title of the Respondents. Had it been intended to affect the transferees of the Bills of lading, it should have appeared on the face of the Bills of lading themselves.

As to *Calvert's* goods, there is no ground for alleging that those goods were consigned to them as Factors, or affected by any trust whatever. *Lyall, Still, & Co.*, of *London*, having paid the freight and insurance of the goods from *Manchester* to *Hong Kong*, had, to the extent of the amount so paid by them, a first charge or interest in the goods, which they were in a position to transfer, and did, by the assignment, transfer, to the Respondents, unincumbered by any supposed trusts affecting *Liebert's* and *Mendel's* goods.

Sir *R. Palmer*, in reply:—

If there is any ambiguity or doubt in respect to the construction

of the agreement of the 22nd of December, 1866, resort must be had to the rule of exposition laid down in *Sheppard's* Touch., ch. v., s. 9, p. 88 [Ed. by *Preston*], where it is said, that if words have a double intendment, and the one standeth with law, and the other is against law, that is to be taken in that sense which is agreeable to law. Acting upon that principle, Sir *James Wigram*, in *Whitworth* v. *Gaugain* (1) says, "there is no principle upon which a Court of Justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the Debtor." In *Spalding* v. *Ruding* (2) the Master of the Rolls supported the proposition, that in Equity, a transfer of goods for valuable consideration by a Consignee for a limited purpose does not destroy the Consignor's right of stoppage *in transitu*. *Cuming* v. *Brown* (3) is distinguishable. Here the Bills of lading were transferred to secure an antecedent debt, which was invalid as against the Vendors. *Vertue* v. *Jewell* (4) also differs from this case. There *A.*, being indebted to *B.* on the balance of accounts, including Bills of Exchange still running, accepted by *B* for *A.*, consigns goods to *B.* on account of this balance, and it was held that *A.* had no right to stop the goods *in transitu*, upon *B.* becoming Insolvent before the goods were paid for.

24 BD 381

Judgment having been reserved, was now delivered by

SIR JOSEPH NAPIER:—

This was an action of Trover brought by the Respondents against the Appellants in the Supreme Court of *Hong Kong* for 355 bales of merchandize which were shipped at *London* for *Hong Kong* on board a Vessel called the "*Min*," by the direction of *George Lyall* and *Charles Frederick Still*, of *London*, deliverable to *Lyall, Still, & Co.*, or their assigns, according to the Bills of lading, of which the Respondents became the transferees. The Appellants were the Owners of the *Min*.

They pleaded a denial of the conversion, and also a denial that the goods were the goods of the Plaintiffs (the Respondents) as alleged.

The case was tried at *Hong Kong* before the Chief Justice and

(1) 3 Hare, 428.
(2) 6 Beav. 376.
(3) 9 East, 506.
(4) 4 Camp. 31.

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a special jury, and a verdict was found for the Plaintiffs for the amount of the value of the goods.

A motion was afterwards made to have this verdict set aside and a nonsuit entered, pursuant to leave reserved at the trial, on the ground that the Plaintiffs had not proved that they were indorsees of the Bills of lading for valuable consideration without notice, so as to pass property, or that a new trial should be directed on this and other grounds of objection. An order was made that the motion be refused with costs.

This appeal has been brought for the purpose of having this order and the verdict found for the Plaintiffs set aside, and judgment of nonsuit entered or a new trial directed.

[His Lordship here stated the material evidence as it appeared upon the Judge's notes, and which has been already set out (1), and proceeded:—]

In order to decide between the rival Claimants, two questions have to be answered—

First. Did the *transitus* terminate before the demand was made on behalf of the Appellants?

Secondly. Was the transfer of the Bills of lading made to the Respondents for valuable consideration, and without notice of such circumstances as rendered them not fairly and honestly assignable, and so as to transfer to the Respondents a property in the goods freed and discharged from the proprietary lien of the unpaid vendors?

The general rule is, that where goods are sold to be sent to a particular destination named by the Vendee, the right of the unpaid Vendor to stop them continues until they arrive and are delivered there according to the Bills of lading. The *transitus* continues whilst they are in the charge of some third party contracted with as carrier for the purpose of forwarding them, and who has them in charge simply for this purpose. It may suffice to refer to the recent case of *Berndtson* v. *Strang* (2). The documents in evidence as well as the oral testimony in the present case, establish beyond doubt that *Hong Kong* was the destination agreed upon between Vendors and Vendee; and the other parties who intervened, for the purpose of having the goods forwarded to their destination, had them in charge for this purpose only. Their Lordships, therefore,

11 QBD 362

(1) *Ante*, p. 394. (2) Law Rep. 4 Eq. 481.

entertain no doubt that the *transitus* had not ended before the arrival at *Hong Kong*.

The second is the real question in the case. The Respondents contend that they gave value for the Bills of lading; that they had no notice of any special terms of agreement between the Vendors and Vendees, of which they say that they were not informed, and as to which they also say that they were not bound to make inquiry.

The Managers of the Banks (Messrs. *Kaiser* and *Kaye*), were not examined as witnesses at the trial; but it plainly appears on the evidence adduced by the Plaintiffs (the Respondents) that the insolvency of *Lyall, Still, & Co.* was known to the Banks at the time of the assignment, and it is but reasonable to suppose that they were quite familiar with what also, on the same evidence, appears to be the usage of trade as between *Manchester* and *Hong Kong* (see *Newsom* v. *Thornton* (1)).

At the time the Bills of lading were handed over to them, no money was advanced, no benefit was conferred or promised on the faith of these securities. They were transferred simply (as stated in the evidence of the Plaintiffs) in performance of the agreement in the assignment. We have, therefore, to refer to the assignment itself to see what was the interest in these Bills of lading that was agreed to be transferred, as part of what was assigned for the consideration expressed.

The general rule, so clearly stated and explained by Lord *St. Leonards* in the case of *Mangles* v. *Dixon* (2), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed, but it was contended that the case of a Bill of lading is exceptional, and must be dealt with on special grounds.

Doubtless, the holder of an indorsed Bill of lading may in the course of commercial dealing transfer a greater right than he himself has; the exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the trans-

(1) 6 East, 19. (2) 3 H. L. C. 702.

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5 P C 513

action neither fair nor honest. In such a case, if the Vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who, by misplaced confidence, has enabled such third person to occasion the loss should sustain it: *Lickbarrow* v. *Mason* (1). But in this case, at the time of the assignment, *Maclean* had not possession of the documents; nothing was advanced on the faith of them. There is merely a general description of documents expected to arrive, without knowing their contents or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid Vendors. And can it be contended that before *Maclean* got possession of the documents, when his Firm was in a condition of undoubted insolvency, and the terms of the documents were not disclosed, there was conveyed to the Respondents by this assignment the benefit of a prospective breach of trust and violation of contract? There is not a word in the instrument that could be held to convey a greater interest than the Assignors had. The power they might afterwards acquire of committing a fraud upon the Vendors is not "property, estate, interest, claim, or demand, legal or equitable." "It is," says Sir *Edward Coke*, "a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." (*Co. Litt.*, 42 a.) "*Constructio legis non facit injuriam;*" as it is pithily said in the passage from the *Touchstone* referred to by Sir *Roundell Palmer* in his able argument: "The law in its genuine construction prefers a less estate by right to a larger estate by wrong."

The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong. The lien of the unpaid Vendor is allowed by law for the very purpose of protecting him against the insolvency of the Vendee; and the assignment in this case, which left the Assignors in insolvency, even if it could be said that it did not find

(1) 2 T. R. 70.

them so, would be sufficient to originate the very right which, according to the argument for the Respondents, it is also sufficient to extinguish.

In the case of *Spalding* v. *Ruding* (1) the Vendor's right was asserted as against property which had so far passed into the hands of the Consignee that he was enabled by mortgage of the Bills of lading to pass the interest in the goods to the extent of that mortgage; the right of stoppage *in transitu* was upheld as against the surplus, in preference to a claim of the Mortgagee to apply it to liquidate the balance of a general account. This (as Vice-Chancellor *Wood* observes in the case already referred to on the question of *transitus*) was in some degree an extension of what was supposed to be the right of the Consignor, and it shews the desire to give this right a full and equitable protection.

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Doubtless the Vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents; where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; where, upon the true construction of the assignment, no interest passed that would place the Assignee in a better position than the Assignor, and the Bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment and without other consideration whatsoever, it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the Vendor's claim.

Their Lordships, therefore, are of opinion, that the Chief Justice ought to have nonsuited the Plaintiffs, inasmuch as, upon their evidence, it did not appear that they had acquired a property in the goods sufficient to sustain the action of Trover for the conversion alleged, which took place after the assertion of the right of stoppage.

(1) 6 Beav. 376.

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They will, therefore, recommend Her Majesty that the Order appealed against should be set aside, together with the verdict found for the Respondents, and that a judgment of nonsuit should be entered.

The Appellants to have their costs of this appeal.

Solicitors for the Appellants: *Reed, Phelps, & Sidgwick.*
Solicitor for the Respondents: *Ambrose Parsons.*

J. C.* 1869 *Feb.* 5, 6.

JAMES MURPHY AND MICHAEL LYNCH . APPELLANTS;

AND

HUGH GLASS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Action against Surety—Equitable plea—Sufficiency of averments—Facts within Plaintiff's knowledge—Demurrer—Parties to action.

In an action against a Surety to recover a part of a debt, by the first and second counts the Plaintiffs declared as indorsees of a Bill of Exchange drawn by them, and accepted by *H.*, indorsed by the Plaintiffs to the Defendant, and by him to the Plaintiffs; the third and fourth counts were upon another Bill of Exchange; and the fifth count was upon a deed whereby the Defendant bound himself to secure payment by *H.* of his two acceptances. The counts upon the two Bills averred that the Plaintiffs indorsed the Bills to the Defendant without consideration, in order that they might be indorsed by the Defendant to the Plaintiffs for the purpose of the Defendant becoming Surety for the payment of the Bills by the acceptor, *H.*, to the Plaintiff. As to a sum of £4,606, part of the money so alleged to have been secured by the Bills and Deed, the Defendant, to the five counts, pleaded, on equitable grounds, that the two Bills which were guaranteed by the Defendant had been given for the balance of the purchase-money for certain Stations in *New South Wales*, previously purchased by *H.* from the Plaintiffs, under an agreement which provided, that in case of any dispute between the Vendors and the Purchaser as to any matter connected with the sale, such dispute should not annul the sale, but should be referred to arbitration in the manner therein stated; and the plea further stated, that a dispute had arisen as to the extent of land comprised in the Stations, that *H.* had appointed one *S.* as his Arbitrator, that the Plaintiffs neglected to appoint an Arbitrator, and that *S.* made his Award concerning the dispute, and thereby awarded that the Plaintiffs should pay to *H.* £4,606, in satisfaction of his claim. The plea also stated,

* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER.

that *H.*, before the commencement of the suit, claimed and offered to deduct and set off the sum of £4,606 against an equal amount in price :—

Held, first, that the plea constituted a good equitable defence to the action, as, from the nature and terms of the Contract set forth in the plea, the compensation admitted to have been awarded was an abatement of the price of the Stations, and reduced *pro tanto* the amount of the purchase-money then unpaid, and as in equity the Defendant might have claimed the benefit of the amount of compensation awarded as a deduction, he was entitled to put this forward as a defence, on equitable grounds, to so much of the cause of action as was covered by that amount:

Secondly, that it was not necessary to the validity of the plea, that it should expressly aver that no more of the purchase-money was due than the amount secured by the Bills, or that, in the absence of an express averment, it must by the rule of pleading be taken against the Defendant, that the fact was otherwise, as the rule does not apply to the pleading of facts which lie peculiarly within the knowledge of the opposite party :

Thirdly, that as the Plaintiffs did not reply and avoid the plea on equitable grounds, but demurred, the allegations in the plea were to be taken without any denial or qualification, and every fair and reasonable intendment made.

Held, further, that in considering the validity of the equitable plea with respect to parties, it was necessary to bear in mind, that *H.* was not a necessary party to the action, as a Court of Equity could, without making *H.* a party, grant an unconditional injunction restraining the Plaintiffs from suing out execution upon a judgment, so far as related to the sum of £4.606, to which the plea applied.

THIS appeal was brought from a judgment of the Supreme Court of *Victoria*, in an action instituted by the Appellants, as Executors of one *Patrick O'Dea*, against the Respondent, upon a demurrer by the Plaintiffs to the first plea of the Defendant, and two demurrers by the Defendant to the first and fifth replications of the Plaintiffs to the first plea, by which judgment it was determined, that the first plea was good in substance, and that the first and fifth replications to the first plea were bad in substance.

The declaration contained six counts; the first and second counts were upon a Bill of Exchange for the sum of £10,266 13*s.* 2*d.*, dated the 2nd of March, 1865, payable two years after date, drawn upon one *Higgins*, and subsequently indorsed to the Plaintiffs by the Defendant as surety for *Higgins*. The third and fourth counts were upon another Bill of Exchange for £1,642 13*s.* 3*d.*, of the same date, payable two years after date, drawn upon *Higgins*, and subsequently indorsed to the Plaintiffs by the Defendant as surety for *Higgins*. The fifth count was upon a guarantee of the Defendant, dated the 5th of March, 1866, whereby the Defendant agreed to

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indorse and make himself liable as surety for *Higgins* for the two Bills of Exchange mentioned in the previous counts. The sixth count was for interest.

The Defendant, by his first plea, as to the sum of £4,606, parcel of the moneys in the first, second, third, fourth, and fifth counts of the declaration, for defence, on equitable grounds, stated that the two Bills of Exchange which were guaranteed by the Defendant had been given for the balance of the purchase-money for certain Stations previously purchased by *Higgins* from the Plaintiffs, under an agreement which provided that in case of any dispute between the Vendors and the Purchaser as to any matter connected with the sale, such dispute should not annul the sale, but should be referred to arbitration in the manner in the plea stated, and, among other things, provided, that in case of such neglect as in the plea mentioned by either party, to appoint an Arbitrator, the award and decision of the Arbitrator appointed by the other party should be final and conclusive. And the plea further stated, that such dispute, as aforesaid, had arisen as to a matter connected with the sale, viz., as to the extent of land comprised in the Stations, that *Higgins* had appointed one *Snodgrass* as his Arbitrator, that the Plaintiffs were guilty of neglect in appointing an Arbitrator, and that *Snodgrass* made his award concerning the dispute, and thereby awarded and adjudged that the Plaintiffs should pay to *Higgins* £4,606 in satisfaction of his claim; and the plea also stated that *Higgins*, before the commencement of the suit, claimed and offered to deduct and set off the sum of £4,606 against an equal amount of the price.

The Plaintiffs demurred to the first plea, and also filed five replications to the same plea. The first replication, the only material one at issue, stated, that on the 20th of September, 1865, before the date of the Defendant's guarantee mentioned in the declaration, and before the Award of *Snodgrass*, a previous Award had been made by one *Cowderoy*, upon certain matters theretofore in dispute between the Plaintiffs and *Higgins* relating to the sale, which matters appeared on the face of the replication to be different from the matter in dispute upon which *Snodgrass* afterwards made his Award. And further stated, that by the Award *Cowderoy* assessed the compensation to be allowed to *Higgins* by the Plaintiffs at

£5,072 4*s.* 9*d.*; and that before the making of the Award by *Snodgrass* the sum of £5,072 4*s.* 9*d.* was paid by the Plaintiffs to *Higgins*. And the replication further stated, that the Award of *Snodgrass* was made after the Award of *Cowderoy*.

The fifth replication traversed the allegation, that *Higgins* claimed and offered to deduct and set off the sum of £4,606, in the plea mentioned, against an equal amount of the price.

The Defendant demurred to the first replication, on the ground that the matter thereof was not the matter referred to by the plea, and was no avoidance thereof; and to the fifth replication, on the ground that the allegation traversed was immaterial.

On the 5th of September, 1867, the following judgment of the Supreme Court was delivered by the Chief Justice, Sir *William Stawell*:—"We are of opinion, that on these demurrers our judgment should be for the Defendant. During the argument the validity of the plea formed the principal if not the sole subject for consideration, the replications being treated rather as attacks than answers. We propose to deal with the objections to the plea *seriatim* as they were made. It was urged that as the defence was only to a part, and judgment had been allowed to go by default as regards the remainder of the cause of action, a plea on equitable grounds was inadmissible. Judgment on such a plea, it was said, must be 'that the Plaintiff take nothing by his writ, &c.,' and as it might be necessary to issue execution in order to recover damages on the judgment signed by default, the plea was inapplicable and bad. There can be no doubt that Courts of law possess no power to adjust equities between the parties, and if the equities are conditional on which such a plea as the present is based, it cannot be sustained, but where there is an absolute and unconditional answer in equity to the whole or any part of a declaration, and for which a perpetual injunction would issue to restrain proceedings at law, the circumstance that such a plea is limited to a part only, and does not extend to the whole cause of action, will not, in our opinion, affect its validity. It may be a sufficient answer to the part to which it is pleaded. If this were not so, a Plaintiff with a cause of action for a certain amount might, by claiming more than that amount in his declaration, exclude a fair defence to it on equitable grounds. This objection was pressed at such length, we

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deem it right to notice it, though it appeared to us scarcely to admit of doubt. It was further urged that a surety cannot take advantage of the set off of the principal, and this forms the material ground of demurrer. The circumstances of the case are peculiar, but it is inaccurate, in our opinion, to describe as the set off of the principal the amount by which the original debt secured has been reduced, although that reduction may have been effected by an arrangement between the Creditor and the principal Debtor. The Arbitrator awarded that the Vendor should pay a certain sum to the Purchaser in satisfaction of his claim; as the purchase-money was paid by Bills of Exchange, he, the Arbitrator, could not have directed them to have been reduced, for those bills might at the time of the Award have been in the hands of third persons. Instead of reducing the purchase-money, therefore, it was proper that the reduction or compensation should have been effected by adjudging a sum to be paid, but this sum was paid in consequence of a deficiency in the article purchased, and was in substance a reduction of the purchase-money, that is, of the sum for which the Defendant was surety. As a general rule, one person cannot set off as against a claim by another a debt between that other and a third party, but this set-off, so to call it, is substantially part of the debt sued for, though in form directed to be paid by the Plaintiff in the action to a third person. The case to which we were referred, *Pearl* v. *Deacon* (1), is, in our opinion, an authority that the Creditor and principal Debtor cannot by any acts or arrangements between themselves exclude the Surety from shewing that the debt secured either has been reduced or that it ought to be reduced. If there is a sum which may be set off in reduction it must be set off, for if the setting off were to depend on the option of either the Creditor or the principal Debtor the surety might be compelled to pay the Creditor more of the original debt than the Creditor himself could have recovered from the principal Debtor. It was further objected, that only one award could be made respecting any disputes connected with the sale and purchase of the Station, and that as an award had been made, although admittedly respecting other matters than the area or extent of the Station, all power to refer any further disputes had been exhausted. No authority was cited in

(1) 1 D. G. & J. 461.

support of this proposition. It may be, and doubtless is, both inconvenient and expensive that there should be several arbitrations and Awards where one general reference would have sufficed, but we cannot on such grounds only deprive either Vendor or Purchaser of the mode of redress by reference of disputes to a domestic Tribunal which they have themselves expressly provided. If an action were brought for this deficiency, a plea of the power to refer should shew affirmatively that the Plaintiff having had the opportunity had failed to avail himself of the power of referring the dispute in question. It does not, however, appear when this deficiency was discovered either by Vendor or Purchaser, or whether it was before or after the reference mentioned in the replication had been made. We do not say that, even if it had been known to the parties before the first reference, the omission to include it in that submission would necessarily and *per se* have deprived the purchaser of all right to submit it to arbitration. The last objection was the validity of the Award. The Award itself appears to us informal. It is not expressly alleged that the Arbitrator found there was any deficiency in the extent of the Station, nor does the plea contain any averments similar to those in the replication on the like subject, all of which, if not essential, are at least usual, but the precise character of the dispute need not necessarily be shewn. The part laid under a *videlicet* might be rejected, and it would still appear that a dispute concerning a matter connected with the sale and purchase had arisen, had been referred to arbitration, an Award concerning it made, and a sum thereby adjudged in satisfaction of the claim. On demurrer we think it sufficiently appears, that the dispute was a proper subject matter for reference, and that an Award was made by which that dispute was disposed of, though not expressly alleged. We also think it may be fairly inferred that the Arbitrator was satisfied there was a deficiency in the extent of the Station. That deficiency formed the dispute; he adjudicated on the dispute, and directed a sum to be paid in satisfaction. There must have been, therefore, some claim to satisfy, and according to the plea it could only have been for the deficiency in extent. The Plaintiff cited and relied on *Ross* v. *Boards* (1), but the circumstances of that case are, in our opinion, wholly different from those of the present.

(1) 8 Ad. & E. 290.

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There, by the Award, a Purchaser entitled to receive a good title to land purchased was compelled to accept that to which he had objected, with an indemnity as a protection against the defects of title, such a course being clearly in excess of the Arbitrator's authority. Here a dispute had arisen by which the sale might have been annulled, but instead the dispute is referred to arbitration, a sum awarded in satisfaction thereof, and the Purchaser accepts that sum as compensation. We think the plea affords substantially an answer, on equitable grounds, to that part to which it is pleaded, and that answer is not, in our opinion, disturbed by the replication. Judgment for the Defendant."

Mr. *Mellish*, Q.C., Mr. *Druce*, Q.C., and Mr. *W. Murray*, for the Appellants:—

The first plea, which the Court, on demurrer, held good in substance, is bad, as it does not shew that the Respondent, if judgment were obtained, would be entitled to any relief against such judgment on equitable grounds. An equitable plea is only good where a Court of Equity would grant relief in full—as an unconditional injunction in a suit between a Plaintiff and Defendant only: *Cummings* v. *Morris* (1) is in point, and resembles the present. In that case it was held that the indorsee of a note, for a consideration not to be paid till the note should be collected, is the real party who has an interest to maintain an action thereon. It appears that the note has been transferred, when past due, to one who was to use the proceeds, in his discretion, for the benefit of the payee's family, and the Court held, that the maker could not set up by way of advances, or counter claim, that the payee was at the time of the transfer indebted to him for advances made to a Firm of which they and a third person, not a party to the suit were Partners, of which no account had been stated, though the payee died insolvent subsequent to the transfer, and further, that conceding that there was no objection to setting off, against a legal demand, a claim arising out of contract that could only be liquidated in equity, the set-off was inadmissible for want of equity. [SIR JOSEPH NAPIER referred to *Collis* v. *Prendergast* (2).]

(1) 11 Smith's Reps. of Cases of the States of New York, 625.
(2) 10 Ir. C. L. Rep. 339.

Here the party is setting up the equity of another person, which he is not entitled to do: *Woodhouse* v. *Fairbrother* (1); *Cummings* v. *Morris* (2). If *Higgins* were hereafter to sue the Plaintiff upon the Award, he would not be bound to anything that occurred in this action. The strict rule in Courts of Equity is, that all persons whose interests may be struck at must be before the Court: *Cockburn* v. *Thomson* (3); *Brooks* v. *Stuart* (4); *Allan* v. *Houlden* (5); *Lloyd* v. *Smith* (6). As the plea does not state that no more of the purchase-money was due than the amount secured by the Bills, it must be taken, according to the ordinary rules of pleading, that more was due; and that being so, the plea takes out of the hands of the Debtor and Creditor their right of appropriating the set-off to the discharge of a particular portion of the debt. The question ought not to be decided in the absence of *Higgins*: *Trickey* v. *Larne* (7); *Elder* v. *Beaumont* (8).

Sir *R. Palmer*, Q.C., Mr. *Quain*, Q.C., and Mr. *Hemming*, for the Respondent:—

With respect to the objection that the action was defective, as *Higgins* was a necessary party, this being an equitable plea must be viewed in the light of a suit in equity. There the only necessary parties would be the Plaintiffs and Defendant. *Pearl* v. *Deacon* (9) is a case in point; there the equities were administered in the absence of the principal; it appears from the Registrar's Book, though it is not clearly stated in the reports, that the debtor was a party on the record, the only parties stated were the Plaintiff and the creditors. In *Collis* v. *Prendergast* (10), referred to by one of your Lordships, an opinion is intimated, that it is not necessary that all parties should be before a Court of Common Law upon an equitable plea whose presence would be necessary in a suit in Equity: *Stephens* on Pleading, sec. 4, rule 7, p. 387 [5th Ed.] *St. John* v. *St. John* (11) illustrates the rule. The case of *Cummings* v. *Morris* is distinguishable. There the attempt

(1) 5 E. & B. 207. 1 Jur. N.S. 998
(2) 11 Smith's Reps. of Cases of the States of New York, pp. 625, 638.
(3) 16 Ves. 321.
(4) 1 Beav. 512.
(5) 6 Beav. 148.
(6) 13 Sim. 457.
(7) 6 M. & W. 278.
(8) 8 E. & B. 353. 4 Jur. N.S. 24
(9) 24 Beav. 186; 1 De G. & J. 461.
(10) 10 Ir. C. L. Rep. 339.
(11) Hob. 78.

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(9 Sc. 3 Jur. N.S. 879, 1187)

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was to set off unadjusted debts, which could not be adjusted without the intervention of a third party. It is clear that a Surety has a right to set off a debt due to his Principal, as well as one to himself: *Byles* on Bills, p. 118 [9th Ed.]: *Story's* Equity Juris. vol. ii., secs. 1437 and 1442. The difficulty, if any, in the suit, arises from the plea, which is an equitable plea, being pleaded in a common law suit. But it is a good plea at law to so much of the declaration as it is pleaded to, and it is well settled that an equitable plea may be upheld on legal grounds. It was not necessary that the plea should negative the supposition that more might be due than the amount of the bills: *Stephens* on Pleading, p. 387 [5th Ed.] The affirmative of the fact would properly come from the other side: *The Sunderland Marine Insurance Company* v. *Kearney* (1); *Sloper* v. *Cottrell* (2); *St. John* v. *St. John* (3); *Wyld* v. *Pickford* (4); *Ex parte Hippins* (5); *Ex parte Stephens* (6).

Mr. *Druce*, in reply:—

First, as to the question of parties. We submit, that the principal Debtor, *Higgins*, was a necessary party. The rule of the Court of Chancery is, that any party having an interest affected by the relief sought by the Bill is a necessary party to be before the Court. A principal Debtor is a necessary party to a suit: *Brooks* v. *Stuart* (7). So in *Allan* v. *Houlden* (8), one of two Sureties who had joined the principal Debtor in a Bond, filed a Bill to set aside the transaction on the ground of fraud, and for an account of the payments of the Bond, and it was held that the principal Debtor and co-surety were necessary parties. Secondly, the averment in the first plea that the contract should go for the £4,606, is bad. A plea in Equity must shew what the equity is. It is not so shewn here. The same rule applies at Common Law: *Trickey* v. *Larne* (9). The principle of equitable set-off laid down in *Ex parte Stephens* (10) is explained in *Ex parte Hanson* (11).

(1) 16 Q. B. 925.
(2) 6 E. & B. 497.
(3) Hob. 78.
(4) 8 M. & W. 443.
(5) 2 Gl. & Jam. Bky. Cases, 93.
(6) 11 Ves. 24.
(7) 1 Beav. 512.
(8) 6 Beav. 148.
(9) 6 M. & W. 278.
(10) 11 Ves. 24.
(11) 12 Ves. 346; affirmed on appeal, 18 Ves. 232.

The consideration of the judgment having been deferred, judgment was now pronounced by

LORD CHELMSFORD:—

The Plaintiffs (the Appellants) declared as indorsees of two Bills of Exchange, one for £10,266 13*s.* 2*d.*, the other for £1,642 13*s.* 3*d.*, dated the 2nd of March, 1865, drawn by the Plaintiffs upon and accepted by *Higgins*, indorsed by the Plaintiffs to the Defendant (the Respondent), and by the Defendant to the Plaintiffs; and also upon an instrument under seal whereby the Defendant bound himself to secure payment by *Higgins* of his two acceptances. The counts upon the bills averred, that the Plaintiffs indorsed the Bills to the Defendant without consideration, in order that they might be indorsed by the Defendant to the Plaintiffs for the purpose of the Defendant becoming Surety as such indorser for the payment of the Bills by the acceptor, *Higgins*, to the Plaintiffs.

The Defendant, as to £4,606, parcel of the moneys secured by the Bills and Deed, pleaded for defence, on equitable grounds, that before the making of any of the Bills there was an agreement between the Plaintiffs and *Higgins* for the sale of certain Stations for the sum of £46,199 19*s.* 1*d.*, subject to the condition that in case any dispute should arise between the Vendors and the Purchaser as to any matter or thing connected with the sale and purchase, such dispute should not annul the sale, but should be settled by arbitration. That such a dispute did afterwards arise, and that upon a reference to arbitration the Arbitrator awarded that the Plaintiffs should pay *Higgins* £4,606 in satisfaction of his claim. That the Bills were made by the Plaintiffs and accepted by *Higgins* for and on account of the said sum of £46,199 19*s.* 1*d.*, and upon and for no other consideration whatsoever; and that before the commencement of the suit *Higgins* claimed and offered, and still claims and offers, to deduct and set off the said sum of £4,606 against an equal amount or part of the said sum of £46,199 19*s.* 1*d.*

To this plea the Plaintiffs demurred.

They also replied, first, that an Award was made under the power of reference in the contract of sale before the making of the

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Award stated in the plea; and, fifthly, they traversed the last allegation in the plea.

The Defendant demurred to these replications, and judgment was given for him upon all the demurrers.

The appeal from the judgment upon the demurrers to the replications may be very shortly disposed of.

The first replication is clearly bad, as it does not aver that the claim in respect of which the £4,606 was awarded was or could have been included in the former reference.

The fifth replication is bad, as it tenders an immaterial issue.

The question as to the validity of the plea depends upon this, whether, upon the averments it contains, coupled with those in the declaration, a Court of Equity would, upon the application of the Defendant against the Plaintiffs, without bringing *Higgins* before the Court, grant an injunction to restrain the Plaintiffs from suing out execution upon a judgment for the sum of £4,606 to which the plea applies.

From the nature and terms of the contract set forth in the plea, it is obvious that the compensation admitted to have been awarded was an abatement of the price of the Stations, and reduced *pro tanto* the amount of the purchase-money then unpaid. If, at the time of making the Award, the sum secured by the Bills was all that remained due of the purchase-money, the Defendant might in equity have claimed the benefit of the amount of compensation awarded, as a deduction from that sum. If so, he was entitled to put this forward as a defence on equitable grounds to so much of the cause of action as was covered by this amount.

But it was contended on the part of the Appellants, that the Defendant could have obtained no relief in equity without bringing *Higgins* before the Court, as he might be able to shew the existence of equitable circumstances which required that the £4,606 should not be deducted for the benefit of the surety, and, therefore, as *Higgins* could not be made a party to the action, the plea was necessarily insufficient.

To sustain this objection, however, it must appear that at the time of making the Award, there was more of the purchase-money

due and owing to the Plaintiffs than was secured by the Bills of Exchange.

It was urged that to make the plea good, it should have been expressly averred that no more of the purchase-money was due than the amount secured by the Bills, and that, in the absence of an express averment, it must, by the rule of pleading, be taken against the Defendant that the fact was otherwise.

But this rule does not apply to the pleading of matters which are peculiarly within the knowledge of the opposite party: *Hobson* v. *Middleton* (1). And with reference to this equitable plea, it may be observed, that the same exception to the rule that pleadings are to be taken most strongly against the party pleading, is recognised in Courts of Equity. See *Mitford* on Pleading [5th Ed.], pp. 45, 347.

The Plaintiffs were at liberty in this case to reply and avoid the plea on equitable grounds, but they chose to demur, and thus leave the allegations in the plea without denial or qualification. Every fair and reasonable intendment, therefore, ought to be made in support of the plea so far as it relates to matters peculiarly within the knowledge of the Plaintiffs.

The Plaintiffs had the fullest means of knowing the state of the accounts, and what balance of the purchase-money was due from *Higgins* at the time of the Award. If more was owing than was covered by the Bills, that fact should have come from the Plaintiffs by way of replication. In the state of the pleadings it must be taken that the only unpaid part of the purchase-money was that which was secured by the Bills. This being so, it does not appear that there is any ground for the objection that the Court could not do complete and final justice between the parties upon the equitable plea because *Higgins* was not before them. If the Defendant had been compelled to pay the full amount of the Bills, he would of course have had a remedy over against *Higgins;* and if a Bill had been filed by the Defendant to restrain the Plaintiffs from issuing execution upon a judgment for the £4,606, and *Higgins* had been made a party to the suit, what equity could he possibly have urged against the Defendant? The plea, therefore, constitutes a good equitable defence to the action, so far as relates to the

(1) 6 B. & C. 302.

J. C. 1869 MURPHY v. GLASS.

sum of £4,606; and their Lordships will recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Solicitors for the Appellants: *Murray & Hutchins.*
Solicitors for the Respondent: *Holmer, Robinson, & Stoneham.*

J. C.* 1869 *Feb.* 8.

WILLIAM CRAWLEY STACE . . . . . APPELLANT;

AND

WILLIAM MORRISON GRIFFITH . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ST. HELENA.

Action for libel—Privileged Communication—Trial—Misdirection—Verdict—Damages—Leave to appeal on special terms—Staying Execution.

Action by an Assistant Master of the Government School at *St. Helena*, against the Commanding Officer, a member of the Executive Government in that Island, for a libel contained in a Letter written by the Defendant to the Colonial Secretary of the Island, stating that the Plaintiff was drunk and disorderly at a certain time and place. At the trial the Letter was not given in evidence, or the publication proved, but the Judge told the jury that they had to find, whether it was a privileged communication or not, and directed them to decide whether or not the Defendant had taken sufficient care to ascertain the truth of the statement made to the Colonial Secretary, and upon this it would be for him to decide whether the Defendant's communication was a privileged one or not. The jury found for the Plaintiff with damages, and the Judge, a few days afterwards, gave judgment concurring with the verdict:—

Held, that the proceedings were altogether irregular, and judgment arrested, the Judge having taken upon himself the functions of the jury, first, in leaving it to them to determine whether the alleged libel was contained in an official document and a privileged communication; and, secondly, in not leaving it to them to say whether the Letter, if published, was *bonâ fide*; and if so found, then it was for him to determine whether, under all the circumstances, it was not a privileged communication.

The Defendant did not apply to the Court below for a new trial, but upon special application for leave, the Judicial Committee, after hearing Counsel on both sides, allowed the appeal on the ground of the Judge's misdirection:—

Held, that it was too late at the hearing to object, that the Appellant ought to have applied to the Court below for a new trial.

In granting special leave to appeal from a judgment in an action in which

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* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER.

damages were awarded, the Judicial Committee imposed terms on the Petitioner, in addition to giving security for costs, to find security for the amount of the damages awarded by the jury, and upon the compliance of such terms, ordered execution of the judgment of the Court below to be stayed.

THIS was an action for libel, in which the Respondent was Plaintiff and the Appellant, Defendant.

The declaration, as amended, alleged, that the Defendant falsely and maliciously wrote and published of the Plaintiff, in a letter addressed to the Colonial Secretary of the Island of *St. Helena*, that the Plaintiff was drunk and disorderly at the theatre, at *Ladder Hill*, on the night of the 17th of October, 1866, and the Plaintiff declared, that the imputation exposed him, as Assistant Master of the Government Head School, to the censure of his superiors, and ultimately to suspension, and dismissal from his situation or appointment under the Government.

The Defendant pleaded not guilty.

The action was tried before the Chief Justice *Phelps* and a special jury.

It appeared from the evidence at the trial, that the Defendant, the present Appellant, was a Colonel in the Corps of Royal Engineers, commanding Her Majesty's troops in the Island of *St. Helena*, and, *ex officio*, a member of the Executive Council in that Island; and that the Plaintiff (the Respondent) was Assistant-Master in charge of the Government Head School in *St. Helena*, having been provisionally appointed to such office on the 18th of July, 1866. That on the 17th of October, 1866, a theatrical entertainment was given by the Defendant's permission at a theatre, within the Fort of the Island, by the Officers and men of the Royal Artillery. The Defendant was present on that occasion, and it appeared that considerable noise and disorderly conduct took place; and on his complaining to Captain *Kelly*, the senior officer in charge, the latter told him that two of his men had reported to him that the Plaintiff was drunk, and was the cause of it. It appeared that on former entertainments complaints of disorder had arisen, and about a week before Captain *Kelly* had requested that a Policeman might attend to keep order, and on this occasion he again spoke to the Defendant on that subject, who thereupon thought it his duty, as the Officer responsible, to write

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a Letter to Mr. *Pennell*, the Colonial Secretary of the Island, requesting the attendance of a Policeman on future occasions, and communicated to him the statement made to him by Captain *Kelly*, to justify his request.

In December, 1866, the Respondent commenced an action of libel against the Appellant in the Supreme Court of the Island in respect of this Letter, which was tried on the 10th of January, 1867, before the Honourable *William R. Phelps* (since deceased), then Chief Justice, and a special jury, but as the jury could not agree, they were discharged without giving a verdict.

The Respondent then brought a second action against the Appellant, the result of which was the subject of the present appeal.

The action was tried on the 1st of May, 1867, when evidence was given of the alleged libel, but the Letter containing it was not produced.

At the close of the Plaintiff's case the Defendant's Counsel submitted to the Judge that the libel was not proved, that the Letter was a privileged communication, and that there was no evidence of malice, but the Judge declined to stop the case. The Judge, in his summing up, observed that there were certain points which he would reserve to himself to decide, but there was one point which he would put to the jury, and he told the jury that it was unnecessary to read to them the evidence before him unless they wished it; that they had to find whether the Letter was a privileged communication, or not; that the only evidence given of it was by Mr. *Pennell;* that there was not a tittle of evidence to shew personal or express malice, or of special damage to the Plaintiff; and he directed them to decide, whether or not the Defendant had taken sufficient care to ascertain the truth of his statement to the Colonial Secretary, and upon this it would be for him to decide whether the Defendant's communication was a privileged one or not, if they found he had not, it would be for them to consider and regulate the amount of damages.

The jury asked to be shewn the original Letter written by the Defendant to the Colonial Secretary, but the Judge said it was wholly unnecessary, whereupon the jury found a verdict for the Respondent, with £450 damages.

On the 13th of May, 1867, the Chief Justice gave judgment for

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the Plaintiff, alleging the following reasons:—That from the Colonial Secretary's evidence he was aware that the Defendant had written a Letter to the Colonial Secretary to the effect that *Griffith*, the Respondent, was intoxicated, and he was unable to reconcile this with the evidence that he had done nothing to injure *Griffith*; that the Defendant had the best legal advice obtainable, yet the note was not produced, nor a copy of it; that if the Government had not given up the Defendant's name as the author of the report about *Griffith* no power on earth could have compelled it; the Letter not being produced he was unable to compare it with the words of the declaration in order to verify them, but he presumed the libel to have been fully proved, and gave judgment for the Plaintiff.

Application was made to the Court below for leave to appeal, which the Judge refused. The Defendant then presented a special petition to Her Majesty in Council for leave to appeal from the judgment of the Supreme Court of *St. Helena*. The petition alleged, that in making the report contained in the Letter addressed by the Defendant to the Colonial Secretary, the Defendant acted solely in the *bonâ fide* discharge of his duty, and without any malicious motive whatever; that owing to the strong local prejudice, and an impression that Government would have to pay the costs and damages, if any, of the action, it was impossible for him to obtain a fair and impartial trial; that the direction of the Judge was erroneous, and the verdict against evidence; that by the Order in Council of the 13th of February, 1839, an appeal from a judgment of the Supreme Court of *St. Helena* is only allowed in respect of any matter above the amount or value of £500 sterling, and he, therefore, prayed for special leave to appeal from the above judgment of the Supreme Court, and that the Plaintiff might in the meantime, and pending the appeal, be restrained from taking any proceedings upon the judgment obtained by him.

J. C.* 1867 *Nov.* 26.

Mr. *Field*, Q.C., for the Petitioner:—

The subject matter of the suit being under £500, the appealable value limited by the Order in Council of the 13th of February,

* *Present*:—LORD CAIRNS, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, and SIR RICHARD TORIN KINDERSLEY.

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1839, the Court below had no power to give leave to appeal. There is only one Judge in the Island, and he sits in the Court of appeal. The case, however, discloses such errors in law as, I submit, entitle the Petitioner to the benefit of the discretion vested in this Tribunal under the 3 & 4 Will. 4, c. 41, s. 4. The Judge misdirected the jury. The whole proceedings were irregular.

Mr. *Butler Rigby*, appeared for the Respondent, and opposed the application.

LORD CAIRNS:—

A question of considerable importance arises on this application, namely, whether a Letter written by the Petitioner to the Colonial Secretary was a privileged document. That point seems to have been utterly overlooked by the Judge, who left the whole case to the jury. Their Lordships are of opinion, that leave to appeal ought to be granted, that this question may be properly determined. Leave will, however, be granted upon special terms, namely, that the Petitioner give the usual security for the Respondent's costs of appeal, and also deposit with the Registrar the amount of the damages awarded; the Plaintiff to enter into an undertaking to suspend the execution of the judgment.

By an Order in Council made thereon, leave was given to prosecute the appeal upon the terms of the Appellant's depositing £300 for costs, and giving security for payment of the sum of £450, the amount of the damages awarded in the action, the Respondent undertaking at the same time to suspend all proceedings in the action pending the appeal.

The appeal having abated by the death of the Appellant, was, by an Order in Council, revived by his Widow, his administratrix and personal representative, and now came on for hearing.

The Attorney-General (Sir *R. P. Collier*), and Mr. *Archibald*, for the Appellant:—

It is manifest that the verdict cannot be supported. The alleged libel was contained in an official communication by *Stace* to the Colonial Secretary of the Island. It was a privileged communica-

tion. Even if it had not been an official report, it would have been equally privileged. [SIR JOSEPH NAPIER:—In the recent case of *M'Elveney* v. *Connellan* (1), the question of the privilege of a public document is elaborately treated.] It was undoubtedly an official report, and therefore a privileged communication. [LORD CHELMSFORD:—The strange part of the case is, that the Letter was not given in evidence at the trial. The rule as to the admission as evidence of public documents is correctly laid down by Lord *Ellenborough* in *Anderson* v. *Hamilton* (2), that an extract of a Letter cannot be received, and that even if the whole of the Letter was tendered, if it is an official one it is not receivable in evidence.] The Judge misdirected the jury, first, in telling them that they had to find whether the Letter was a privileged communication or not; and, secondly, in telling them that the question they had to decide was, whether the Defendant had taken sufficient care to ascertain the truth of the alleged libel. The proceedings were altogether irregular. No evidence whatever was given at the trial of the writing or publication by the Defendant of the libel. There is, moreover, a substantial difference between the libel in evidence at the trial and that set out in the declaration: there was no evidence of malice. There ought to have been a nonsuit, or arrest of judgment.

Mr. *J. Brown*, Q.C., and Mr. *Butler Rigby*, for the Respondent:—

The jury were right in their verdict. It is not open to the Appellant to question their finding upon appeal. If he was dissatisfied with the verdict, he should have applied to the Court below for a new trial, when all the points now urged could have been taken. It is too late now, as these objections urged do not appear on the record, and this Court cannot entertain them: *Devine* v. *Holloway* (3). There it was held that an objection not raised in the Court below could not be taken in the appellate Court, and that unless it was patent upon the face of the record the appellate Court could not take judicial notice of it. So in *Kay* v. *Marshall* (4), the House of Lords would not permit parties an oppor-

(1) 17 Ir. C. L. Rep. 55.
(2) 8 Price, 244, n.
(3) 14 Moore's P. C. Cases, 290.
(4) 8 Cl. & F. 245.

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tunity to raise objections not taken in the Court below. Now the present appeal is substantially either a motion for a new trial, or to enter a verdict for the Defendant, which cannot be done. [LORD CHELMSFORD:—We have not the Chief Justice's notes, who is dead, but special leave to appeal was granted by this Committee on hearing Counsel on both sides. Why did you not object then upon the ground you now insist on? It is too late now.] Upon the merits, then, we submit that the Letter containing the libel complained of was not a privileged communication, the Appellant was under no duty, legal or moral, to make such a communication. Even if *primâ facie* privileged, it was sufficiently proved that the Appellant was actuated by malice, and the evidence of malice was properly left to the jury.

LORD CHELMSFORD:—

A preliminary objection has been taken on behalf of the Respondent that in this case an appeal will not lie, because there was no application made in the Court below for a new trial. But an application was made to this Committee for leave to appeal, and that application was attended by Counsel on both sides. Their Lordships heard the matter fully argued, and, under all the circumstances, thought that leave ought to be granted. It is therefore impossible that at this stage of the proceeding there can be any valid objection raised to the hearing of the appeal.

The proceedings in *St. Helena* were certainly of a most extraordinary character. The action was brought originally upon an alleged libel, that the Defendant had published a false, &c., report according to the tenor and effect following, *i.e.*, "that the Plaintiff was said to be in a state of intoxication on the 17th of October, 1866." There was a demurrer to that declaration, and after hearing the parties the Judge ordered the demurrer to be withdrawn and the declaration to be amended, with costs. The declaration was amended, and it is now in this form:—"That the Defendant falsely and maliciously wrote and published of the Plaintiff, in a certain note addressed to the Colonial Secretary of the Island, that he, Mr. *Griffith*, was drunk and disorderly at the theatre at *Ladder Hill* on the night of the 17th of October, 1866."

The cause was tried by a special jury, and their Lordships are at

a loss to understand how and where some of the witnesses were examined. Before the evidence of Captain *Kelly* there appear in the report of the proceedings the words "In Chambers," and the date, February 26th, 1867; and before the evidence of Colonel *Stace* the same words, and the date, 15th of April, 1867. The rest of the evidence is headed "*Nisi Prius.*" It appears, therefore, that a portion of the evidence upon this jury trial was taken by the Judge in his private room (whether it was read to the jury is nowhere stated), and only part of the witnesses were examined in the presence of the jury. What is still more extraordinary is, that Captain *Kelly's* evidence was taken before the first declaration, the one that was demurred to and amended, had been filed, which was not till the 4th of March, 1867. The amended declaration was dated the 5th of April, and the issue was only joined between the parties on the 15th of April.

The conduct of the Judge at the trial seems to have been equally remarkable. According to the statement of Mr. *Griffith*, the Plaintiff, in an affidavit produced at the hearing of the appeal, evidence was given at the trial of malice and of damage, those being the two points submitted by the Judge for the consideration of the jury upon the trial of both actions (the jury having been discharged on the first trial), and the Judge stated it was for him to consider whether the libel was proved or not. Before the jury could find a verdict for the Plaintiff, the Judge must have told them that, in his opinion, the letter written by Defendant was a libel, and that the Defendant was liable for it. Accordingly, the jury found a verdict for the Plaintiff, with damages to the amount of £450. The Judge gave his judgment a few days afterwards, saying that he entirely concurred with the verdict, that the Defendant had all the advantages that could be obtained, and that he was of opinion, having carefully looked over the evidence, that the libel was clearly proved, and he gave judgment for the Plaintiff.

Now, the Judge seems to have taken upon himself the functions of the jury, and to have entirely neglected his own duty, because there were most important legal considerations in this case, all of which it was his bounden duty to have decided. In the first place, it was necessary at the trial that the Judge should have determined whether the Letter to the Colonial Secretary was not privileged as an official communication. If the Judge was of opinion—and he

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ought to have expressed an opinion on the subject—that the Defendant's note was an official communication, which, on public grounds, ought not to be disclosed, no evidence could have been given of the contents of it. In a case of *Anderson* v. *Hamilton* (1), Lord *Ellenborough* said: "It is said that the fact that there has been a complaint made against the Defendant by the Plaintiff to Lord *Liverpool* is the only fact sought to be put in evidence on this occasion, but it is not competent to the Plaintiff to get at that fact if it be embodied in an official Letter. Neither can an extract of such a Letter be admitted, for the Plaintiff must be entitled to the whole or none, and I think that the whole of this Letter is not admissible on account of the objections taken by the Counsel for the Plaintiff." It was therefore absolutely necessary, before any evidence of the contents of this Letter was admitted, that the Judge should determine that it was not an official communication, and, therefore, that the Colonial Secretary was bound to disclose it. But the Colonial Secretary having declined to produce the Letter on account of its official character, according to the authority of the above case, and according to common sense and reason, the Plaintiff could not get at the contents in the absence of the original, as it was the contents which on public grounds, were not to be disclosed.

We will presently consider what was the effect of the evidence, if admissible and admitted. But there was another question in the case, also of great importance, which it was the province of the Judge to decide, that is, whether the letter in question was not a privileged communication? Now upon the question whether an alleged libel is a privileged communication or not, the proper course at the trial is this:—The Judge is bound to ask the jury whether the matter was published *bonâ fide*. If they come to the conclusion that it was, then it is for the Judge to say whether, under all the circumstances, it is or is not a privileged communication.

The Judge in this case seems never in the slightest degree to have considered these important questions, upon which the case entirely turned, but, taking upon himself the duty of the jury, and determining that which the jury alone could determine, he told them that in his opinion the libel was proved.

(1) 8 Price, 244, n.

The Judge having thus assumed functions which did not belong to him, went entirely wrong in his conclusion upon the fact. The only evidence (because the Letter written to the official Visitors by the Colonial Secretary was not evidence in the case)—the only evidence, supposing it could be admitted in consequence of the Judge being of opinion that the Defendant's letter was not an official communication, was that of Mr. *Pennell*, who said, "Colonel *Stace* informed me by that letter, that Captain *Kelly* had reported you drunk on the 17th of October." Now this evidence would have supported the declaration as it originally stood, but it certainly did not prove the alleged words in the amended declaration, that the Defendant falsely and maliciously wrote and published of the Plaintiff, that he was drunk and disorderly at the theatre. For it is a very different thing to write of a person that the Writer had been told he had been drunk and disorderly, and that he actually was drunk and disorderly upon a particular occasion.

There has, therefore, been a complete failure of justice in this case—a complete misunderstanding on the part of the Judge of what his duty was, and an entire misleading of the jury. Their verdict is one which ought never to have been given, and of which it is to be regretted that the Judge should have expressed his approval.

Under these circumstances their Lordships can only come to the conclusion, that this judgment ought not to stand. The proper course to have pursued would probably have been to quash the whole proceedings, and to fix the Respondent with the costs (at least of the appeal); but as Colonel *Stace* is dead, and the Counsel for his Widow have stated that they do not wish to press for costs, with their consent we have agreed to recommend to Her Majesty that the judgment of the Supreme Court of *St. Helena* should be arrested, the parties paying their own costs of this appeal.

By the Order in Council made on the appeal, it was ordered that the judgment of the Supreme Court of *St. Helena* be arrested on each party paying their costs of the appeal.

Solicitors for the Treasury for the Appellant.
Solicitor for the Respondent: *C. R. S. Hooper.*

J. C.* 1869 March 11.

BELISLE DU BOULAY AND OTHERS . . . APPELLANTS;

AND

JULES RÉNÉ HERMÉNÉGILDE DU BOULAY . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEALS FOR THE WINDWARD ISLANDS.

Saint Lucia—Old French Law—Ordonnances of 1555 *and* 1803—*Registration in the Island—Family name, property in—Assumption of, by Stranger—Action to restrain use of—English Law on assumption of name.*

According to the Law in force in *Saint Lucia* at the time of the conquest and capitulation of that Island in 1803, a family has no such property in their patronymic name as to entitle them to bring a civil action in the Island for a declaration that the name exclusively belongs to them, and to prohibit a stranger, who had assumed their name, from bearing or using it.

The French *Ordonnance* of 1555, not having been registered, never became part of the Law of *France*, affecting her Colonies.

The French *Ordonnance* of the 11th of April, 1803, prohibiting a change of name, except under certain prescribed formalities there enacted, not having been introduced in *Saint Lucia*, forms no part of the Law prevailing in that Island.

Semble: Long acquiescence by the members of a family in the assumption of their family name by a stranger would, even if such an action lay, operate as a bar to a suit to prohibit him from bearing or using such name so acquired by reputation.

In *England* the assumption of a name, the patronymic of a family, by a stranger, who had never before been called by that name, is not the subject of a civil action, as by the English Law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another.

Aliter, as to the exclusive use of a name in connection with a trade or business, which right is recognised, and a party assuming it colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at Law or Equity.

THE Appellants instituted a suit in the Royal Court at *Saint Lucia* against the Respondent for a declaration, that the name of *Du Boulay* assumed by him belonged to them and their family,

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* *Present*:—LORD CHELMSFORD, SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (DEAN OF THE ARCHES AND JUDGE OF THE HIGH COURT OF ADMIRALTY), THE LORD JUSTICE SELWYN, and THE LORD JUSTICE GIFFARD.

and to prohibit the Respondent from bearing or using the name of *Du Boulay*. By the judgment of that Court it was held, that the name of *Du Boulay* belonged to the Appellants and their family, and the Respondent was prohibited from taking, bearing, or signing in future the name of *Du Boulay;* and it was further ordered, that the name of *Du Boulay* should cease to be recognised as the surname in signing all deeds, registers, and other documents, both public and private, executed by the Respondent. This judgment was reversed by the Court of appeal for the *Windward Islands*, principally on the ground, that the French *Ordonnances* of 1555 and the 11th of April, 1803 (1), with respect to the change of names, did not form part of the law, and was not in force, in the Island. The appeal was from this judgment of reversal, and the sole point at issue raised by the appeal was the right of the Respondent to use the name of *Du Boulay*.

The facts of the case giving rise to the suit were these:—

The Appellants, Father and Brothers, were members of a family long resident in the Island of *Saint Lucia*, who had for many generations used and been called by the name of *Du Boulay*.

The Respondent was born on the 17th of February, 1835, and was the illegitimate Son of a Mulatto woman named *Rose*, who was formerly a Slave of the *Du Boulay* family. *Rose* was manumitted in 1831, and was in the *Acte d'Affranchissement* registered in respect of such manumission, named and described as *Rose* only, and in the *Acte de Naissance* of the Respondent, the Respondent's

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(1) The principal Articles relating to this question contained in the *Ordonnance* of the 11th of April, 1803, are as follows:—

Art. 4. "*Toute personne qui aura quelque raison de changer de nom en adressera la demande motivée au Gouvernement.*"

Art. 5. "*Le Gouvernement prononcera dans la forme présente pour les règlements d'administration publique.*"

Art. 6. "*S'il admet la demande il authorisera le changement de nom par un arrêt rendu dans la même forme, mais qui n'aura son exécution qu'après la revolution d'une année, à compter du jour de son insertion au bulletin des lois.*"

Art. 7. "*Pendant le cours de cette année toute personne y ayant droit sera admis à présenter requête au Gouvernement pour obtenir la revocation de l'arrêté authorisant le changement de nom, et cette revocation sera prononcée par le gouvernement s'il juge l'opposition fondée,*" &c.

See *Merlin, Rep. de Jur. verbo* "*Nom;*" *Dictionnaire du Notariat*, s. 2, "*Des Changements de Noms.*"

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Mother was referred to by the name of *Rose*, but it appeared that before his birth and for twenty-three years before her death she had adopted and used the surname of *Du Boulay*, and that the Respondent was formerly known by the name of *Jules Réné Herménégilde*, without surname in either case, and that it was not until he reached the age of sixteen that he assumed the name of *Du Boulay*, which his Mother had assumed, and continued to bear until her death, which occurred in the year 1854. The Respondent was in no way related to the family of the *Du Boulays*.

The Appellants, in the month of July, 1864, sent to the Respondent a Letter calling upon him to abandon the name of *Du Boulay*, so usurped by him. In reply the Respondent admitted that he claimed no relationship with their family, but declined to abandon the name of *Du Boulay*.

In consequence of such refusal the Appellants, on the 21st of April, 1865, instituted a suit against the Respondent in the Royal Court of *Saint Lucia*, praying that the Respondent might henceforth be prohibited from taking, bearing, or signing such name.

After taking evidence shewing the right of the Appellants to the use of the name of *Du Boulay*, and the assumption of that name by the Respondent, and by his Mother, in the year 1841, *J. G. Porter Atthill*, the Chief Justice of the Royal Court of *Saint Lucia*, pronounced judgment in favour of the Appellants in the following terms:—"The Court orders and decides that the name of *Du Boulay* belongs to the Plaintiffs and family, with defence and prohibition to *Jules Réné Herménégilde, alias Herman Du Boulay*, to take, bear, and sign in future the name of *Du Boulay* under all the pains and penalties of the law, and the Court further orders and directs, that the name of *Du Boulay* shall cease to be recognised as the surname of the signing party in all deeds, registers, and other documents, both public and private, signed by the Defendant, or wherein he figures as *Du Boulay*. And thereupon the Court authorizes the Plaintiffs to cause the present decree to be published in the *Official Gazette* and Newspapers of the Island at the expense of the Defendant. The costs to be paid by the Defendant."

The present Respondent appealed from this judgment to the Court of appeal for the *Windward Islands*, and in his case on appeal

submitted, first, that the Appellants' proper name was *Cornibert;* second, that they had assumed a *status* which was not conformable to the titles of their birth; third, that the Respondent's Mother had borne publicly and peaceably the name of *Du Boulay* from the year 1831 to 1854, a period of twenty-three years; fourth, that the Respondent's Brother had borne that name until his death in 1858, and that his legitimate children still bore the same name in the Island of *Martinique;* fifth, that the Respondent was known and called by that name by all his friends and acquaintances; sixth, that the assumption of the name of *Du Boulay,* sanctioned by the usage of such length of time as to give it a permanent character, was not the result of mere whim and caprice; seventh, that there was no Law in *England,* nor in *Saint Lucia,* governing surnames; eighth, that even supposing the action was founded on the merits, it was repelled by prescription; and lastly, that the decree of the Royal Court forbidding the Respondent to bear and sign the name of *Du Boulay* was erroneous in Law.

The appeal was heard before *H. J. Woodcock,* Chief Justice of *Tobago, J. F. Gresham,* Chief Justice of *Grenada,* and *J. G. Porter Atthill,* Chief Justice of *Saint Lucia.* The Judges differed in opinion. The majority of the Court, consisting of the Chief Justices of *Tobago* and *Grenada,* by consent of the parties, gave judgment, by the Hon. *H. J. Woodcock,* as follows:—"The baneful influence of slavery in the *West Indies,* under which the possession of the Slave rendered the unfortunate bondswoman the mere creature of her Master's lust, produced a race degraded by the Mother's shame and the Father's crime; although this class for many years were refused an entrance within the circle of refined society, and although the law denied to its members, as being illegitimate, an inheritance, the present suit is the only attempt I have ever heard of to deprive them or their progeny of a name, and this after thirty years of emancipation, and after the Grandchildren and Great-grandchildren of the almost forgotten Slave have, by education and integrity, won for themselves an equal place with their fellow-men. Thank Heaven, I know of no Law which I can be called on to administer by which such an attempt can be supported. The present Appellant is the issue of a manumitted

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Slave, and has assumed, and for some time borne, the name of *Du Boulay*, and the present suit is instituted to deprive the Appellant of this patronymic. And the Court is to inquire, whether there be any Law in force in *Saint Lucia* by which the object of such a suit can be attained. It was stated from authority at the Bar, that there was a time when in *France* names were changed without any solemnity, but such a latitude was prohibited by an *Ordonnance* of the 11th of April, 1803. Without any hesitation, I say that *Ordonnance* is not in force in *Saint Lucia*. No *Ordonnance* in *France* was deemed to be in force in her Colonies unless registered there, or extended to the Colonies by the Order of the parent State. The *Coutume de Paris* was the law of the French Colonies, but why? because the 33rd Article of the *arrêt* of the "*Conseil d'État du Roi*," of May, 1664, establishing the *West India Company*, expressly declares its obligatory effect in the *West India Colonies*, as it had been established in the French Colonies in the East. The *Coutume de Paris* is still continued as the law of *Saint Lucia*. It does not appear that the *Ordonnance* of the 11th of April, 1803, was extended by its terms, or by any other Edict of the French Government, to its Colonies, and it has not been registered in *Saint Lucia*. The history of *Saint Lucia* throws some further light on this subject. About two months after the passing of the *Ordonnance* of 1803, that is to say, on the 22nd of June, 1803, *Saint Lucia* capitulated to the British arms under General *Greenfield*, and it has remained a British Colony ever since. Now, regard being had to the unsettled condition of *France* in its state of transition at the time of the passing of this *Ordonnance*, to the existence of war, by which the irregularity in the communication then existing between *Europe* and the *Antilles* was necessarily increased, to the length of time consumed in a voyage across the *Atlantic* in those days, and to the slowness that attends on all Government action, it is not too much to presume, in absence of any evidence to the contrary, that this *Edict* was unheard of in *Saint Lucia* at the time of its conquest in 1803. By treating a name as property which may be wrongfully taken from another, as would seem to be attempted by the Respondents here, one commits oneself to this ridiculous paradox. *A.* takes from *B.* his pro-

perty while *B.* still remains in possession of it. The Appellant takes from Respondents their surname, they being at the same time in the possession and enjoyment of it. I do not deem it necessary to prolong the present inquiry further. I can come to no other conclusion than that the judgment of the Court below be reversed, with the costs of suit there and in this Court."

The grounds of dissent of the Chief Justice of *Saint Lucia* were stated by him in these terms:—"The case has been extremely well argued both before this Court and the Court below, and the discussion of it has enabled me to reconcile my judgment in the Royal Court with my present view of the case. The case involves in it questions of infinite importance to families having their domicil of origin in this and the other Islands governed by the French Law, and which have been so repeatedly agitated in Courts of Law in *France* and the Colonies, as to remove any difficulty I might have felt in getting at the justice of the case. The two learned Judges forming the majority of the Court appear to have conceived the main question at issue to be between an ancient Master and his Slave, or rather between a Father and his illegitimate offspring, for their judgment (as prepared by Mr. Justice *Woodcock*) is prefaced by an elaborate dissertation on the 'baneful influence of slavery in the *West Indies*,' the boundless sensuality of the Master, and the degrading condition of the bondswoman and her issue at that time. It is not extraordinary that the learned Judge should have been guided by this only small and purely collateral point in the case, without much examination into the cardinal questions and the real Law of it, for the difficulty which an English Judge has to overcome in this country in the application of the French law is indeed immense. It would be superfluous to discuss here the many questions submitted for consideration in the case, inasmuch as they have been treated in a sufficiently clear and satisfactory style by Counsel on both sides, I will, therefore, only recur to those which are the principal grounds of my judgment. The firs is, whether *Du Boulay* is the Family or patronymic name of the Respondents? The Appellant contends, that the Respondents' family name is *Cornibert* and not *Du Boulay*, and that to that family name, *Cornibert* (I use his own language), has been added

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the surname of *Du Boulay*. This is an attempt which has been, however, proved unsuccessful, for the very documents filed both in this Court and the Court below by the Appellant himself, coupled with the plea put in by his Counsel, wherein *Du Boulay* is called the 'surname' of Respondents' family, shew clearly that *Du Boulay* is the patronymic name of the Respondents, and that their family have been in the possession of it for centuries, as evidenced by the numerous authenticated documents produced by the Respondents, and among which is the certificate of marriage of the late *Jean Louis Cornibert Du Boulay*, the Father and Grandfather of the Respondents, who was at that time thirty years old, and was represented to be the son of one *Jean Baptiste Cornibert Du Boulay*, the Great-grandfather of the said Respondents, that document is dated, April, 1787. It is useless to dwell any longer upon a question which has been so admirably simplified by the Appellant himself; suffice it to observe, that surnames ('*surnoms*') are to-day the pride of families that live in countries where the French law prevails, and that being hereditary they form what is called family or patronymic names. It is the most valuable patrimony of each family; it is transmitted by the Father to the Son; and I may add, without fear of contradiction, that a family or patronymic name being of all property that which is the least within commerce, the Law prohibits its alienation and usurpation. (*Vide Merlin, Rep. de Jur. verbo "Nom;" Dict. du Notariat*, by the modern Jurisconsults of *France*, on the same head.) Next comes a question of some more importance, viz., whether a family or patronymic name is a property, and, as such, hereditary? This question is entitled to much consideration, it being one of the two on which the success of this case entirely rests. In principle, the name of a family is a real right constituted for the benefit and advantage of that family, and has for its exclusive end to prevent confusion between strangers and that family; it emerges from the law of nature, which is '*lex éternel*,' and forms part of the Common Law by which almost all the determinations in Courts of Law are guided. I have minutely studied the leading authorities quoted by the Counsel of the Respondents on this important point, and have no scruple in declaring

my concurrence that a family name is a property that belongs to that family, and can never be taken by persons who have no right to it, either by descent or inheritance. The civil *status* of the Citizens (says *Merlin, verbo* '*État Civil*') is their property, and that property being inviolable, like others, must be submitted to the same rules and to the same forms. This general rule was and is still adopted and followed by both the ancient and modern legislation of *France*, and must be, '*ex necessitate*,' applied to the Courts of *Saint Lucia*, which are still governed by the ancient law of *France* in all matters of property and inheritance: *Dict. du Notariat*, sect. 3, '*De la Propriété des Noms*;' *Merlin, Rep. verbo* '*Nom*,' and '*État Civil*;' *Denisart, Questions d'État*; Decree of the Court of *Paris*, in *Lacarelle* v. *Darien*, in the *Bulletin Judiciare*, June, 1859; *Lawless* v. *Lawless*, Decree of the Court of appeal of *Martinique*, of the 14th of June, 1860, confirming a judgment of the Court of First Instance of that Island of the 14th of February in the same year. As I have, in disposing of the last question, made allusion to the Law that governs property and inheritance in this Island, it would be perhaps well to offer a short gloss upon that Law. On the 26th of May, 1796, when *Saint Lucia* was surrendered to the British arms, a change was made in the formation of its Courts of Law, which was then deemed necessary to be adapted to the wants and circumstances of the Colony, but that new scheme was no sooner put into operation than it was found not to answer, and in or about the beginning of the month of July, 1800, a Proclamation was issued, under the seal and hand of General *Prevost*, for re-establishing the Courts of justice under and conformably to the laws and usages of the French monarchy, which Proclamation was approved by His Grace the Duke of *Portland*, one of Her Majesty's Principal Secretaries of State, on the 31st of October, 1800. The French, as it were, retook *Saint Lucia* and remained in possession thereof until June 1803, when it was carried by storm under his Excellency General *Greenfield* and his Excellency *Samuel Hood*, the head of the British squadron, who, by a Proclamation issued on the 23rd of June, 1803, assured and guaranteed to the inhabitants of *Saint Lucia* the full and entire enjoyment of their property, under the Laws which existed in the Colony at the time imme-

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diately prior to the last cession. Things remained undisturbed from that time to the year 1815, when the Colony was by Treaty finally ceded to the British Government, but under the express condition that the French Civil Laws should continue to be the law of the Island. No substantial changes have been since made except with respect to the Maritime and Commercial law, which has been assimilated to the Law of *England*. It would be difficult to find a clearer and more accurate synopsis of the Civil Law as it existed, and still exists, in *Saint Lucia* than is contained in the official report of the late Chief Justice *Reddie*, Doctor of Law to His Excellency Lieutenant-Governor *Torrens*, in 1844, and in the History of *Saint Lucia*, by *H. H. Breen*, Esquire, the Chief Recorder of the Supreme Civil Courts of the Colony during a space of nearly thirty years, and if such authorities should stand in need of any support, it would have it, not from the very superficial and imperfect view taken by Justice *Woodcock* of the Civil Law of the Island, but from *Clark's* Colonial Law, p. 23; *Black.* Com. vol. i., p. 109. It is, however, necessary here to state, that the Civil Law of the Island, besides the local *Ordonnances*, the Maritime and Commercial law, are nearly the whole of the French Laws anterior to 1789, which are scattered over a great number of authorities, such as the *Coutume de Paris*, which is a part of the ancient '*lex non scripta*' of *France*, the *Ordonnances*, Edicts, and declarations of the French Monarchy, the *Code de la Martinique*, *Pothier*, *Merlin*, *Ferrière*, *Denisart*, *Domat*, *Pigeau*, *Jousse*, and many others unnecessary to mention. With regard to the question, whether a person in *Saint Lucia*, or in any of the other Colonies where the French Civil Law is in operation, can change his name without the authorization of the Government, it may be said that in *France*, under the Law '*de mutatione nominis*,' names were changed according to the whim or caprice of individuals, without any solemnity or formality; but such an unrestrained license brought forth great confusion; names of living families were arbitrarily taken, and towards the commencement of the nineteenth century, on the 11th of April, 1803, a law was made to check that dangerous system (this is the *Ordonnance* referred to by Mr. Justice *Woodcock* in his judgment), and it is not

amiss to observe that that law is not only still in force in this Colony, but has been retained entire by the modern Legislators of *France*, and now forms part of the existing laws of that country: *Merlin, verbo 'Nom;' Dict. du Notariat, 'des Changements de Noms,'* sect. 2; *Troplong 'Prescription,'* No. 248. It is further to be observed that, even in *England*, where there is no positive law regulating the right of families to their names, the rights of third parties are respected whenever it is a question of a change of name, which change must be made under and by virtue of a Royal License, or by an Act of the Imperial Parliament, which is generally obtained on the application of the person who desires to change his name, such application being referred to the College of Arms, but where there are no plausible grounds for said application, and it is obviously the mere result of whim or caprice, it is at once declined without any such reference, leaving it to the party to make the change on his own responsibility. Regulation of 1783,—Sir *Robert Peel's* Act, modifying the same. On the above, among other grounds, I dissent from the judgment of the majority of the Circuit Court of appeal in this cause."

Leave to appeal to Her Majesty in Council was granted by the Court below, and execution of judgment suspended, on giving security until the hearing of the appeal.

As the Respondent did not appear, the appeal was heard *ex parte*.

Mr. *Angelo Lewis* (Mr. *Field*, Q.C., with him), for the Appellants:—

Two facts are beyond dispute. First, the Appellants have, and the Respondent has not, an hereditary title to the name of *Du Boulay*. The question is purely one of law, and does not involve the moral considerations so strongly observed upon in the judgment by the Chief Justice *Woodcock*, and it resolves itself to this narrow point. Has the Respondent, by the Law in force in *Saint Lucia*, a right to assume a name to which he clearly has no family or hereditary title, save the fact of the assumption of it? We contend that he has not, on these grounds, first, that a family name is, by the Law of *Saint Lucia*, property, and the subject of legal protection; secondly, that by that Law no man can change his name

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without due authority; and thirdly, that coloured persons, like the Respondent, the offspring of a mulatto woman, free or enfranchised, are expressly forbidden by Law to assume the name of their Masters.

As to the first point, by the old French Law, as it prevailed in *Saint Lucia* prior to the 22nd of June, 1803 (the Law in force in *Saint Lucia* governing the case), the name of *Du Boulay* is, as between the Appellants and the Respondent, the property of the Appellants and their family, and ought to be protected from usurpation by the Respondent. The *Ordonnances* of the 26th of March, 1555, and of the 28th of August, 1794, are decisive on this point. [LORD CHELMSFORD:—Was the *Ordonnance* of 1555 ever in operation in *Saint Lucia*, or even received as Law in *France? Merlin, Rep. de Jur. tit.* "*Promesse de changer de Nom*" says it never was registered so as to become Law in *France.* Again, how then could it be enforced in *Saint Lucia* without an *Edict* expressly introducing it.] That it was generally received as Law in *France*, and adopted in *Saint Lucia* and the other French West Indian Colonies, appears from the case of *Les Héritiers de Preaux de Longchamps: Dalloz, Tom.* x. pp. 412 and 415.

With respect to the second proposition, the *Ordonnance* of the 11th of April, 1803 (1), which, it is submitted, is also in force in *Saint Lucia*, is conclusive. By that *Ordonnance*, no person could change or alter his name without the express authority of the ruling power to do so: *Merlin, Rep. de Jur. verbo*, "*Nom*"; *Dict. de Notariat*, s. 2; *tit.* "*Des changement de Noms;*" and s. 3, *tit.* "*De la Propriété des Noms;*" and it has been so construed by the Courts in *Martinique* and in *Paris: De Lacarelle* v. *De Lacarelle* (2); and in *Lawless* v. *Lawless* (3).

According to the Law of *France* affecting her Colonies, as regards the third proposition, coloured persons, free or manumitted, were forbidden to take the surnames either of their reputed Fathers, or of their Masters of white complexion, or, indeed, of any white man inhabiting the French Colonies. By *Ordonnance* of

(1) See extracts, *ante*, p. 431.

(2) The judgment in this case, pronounced on the 14th of February, 1860, and the Order made on appeal, dated the 14th of June, 1860, were printed in the Record as extracted from the *Moniteur de la Martinique*, 1860.

(3) Printed in Record, being an extract from the *Bulletin Judiciare* of *Paris*, June, 1859.

the 6th of January, 1773, *Code de la Martinique*, vol. iii. No. 472, p. 157, there is an express prohibition to free coloured persons against taking a name of any white family in the Islands (No. 484, p. 168), and the *Ordonnance* of the 4th of March, 1774, confirms the latter *Ordonnance*.

Lastly, it cannot be successfully urged, that there has been any laches in enforcing the Appellants' rights, on the ground of acquiescence, to bar the remedy. It appears that the first Appellant was for many years previous to 1864 in ill health, and the remaining Appellants were for the greater part of the time in *Europe* for their education and other purposes, and, therefore, had no opportunity during such time to take legal measures to oppose the usurpation of their family name by the Respondent.

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Judgment having been reserved, was now delivered by

LORD CHELMSFORD:—

This is an appeal from a decree of the Court of appeal for the *Windward Islands*, reversing a decree of the Royal Court of *Saint Lucia* in favour of the Appellant.

The suit was instituted in the Royal Court of *Saint Lucia*, for the purpose of having it ordered and decided that the name of *Du Boulay* belongs to the Appellants and their family, with defence and prohibition to the Respondent to take, bear, and sign in future the said name of *Du Boulay*.

The question to be determined upon this appeal is, whether an action of this description is maintainable under the French Law, which at the present time is the governing Law in the Island of *Saint Lucia*.

When a Judge is called upon to decide a question depending upon Foreign Law, there is always some danger of his being influenced by notions derived from that Law which he is in the daily habit of administering. In this Country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a Stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our Law; and any person using that name, after a relative right of this description has been

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acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name, which is the patronymic of a family, by a Stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress.

The Appellants, however, say that by the French law, which is in force in *Saint Lucia*, they have a right to maintain a civil action against the Respondent for assuming their family name of *Du Boulay*.

The following are the facts admitted in the case: The name of *Du Boulay* had been the family name of the Appellants for a very long period. The Respondent is the illegitimate Son of an emancipated female slave, named *Rose*, and was born at *Martinique* on the 17th of February, 1835. Before his birth his Mother had assumed the name of *Du Boulay*, and was so called in a judicial proceeding of the Tribunal of First Instance of *Saint Pierre, Martinique*, on the 20th of August, 1831. In 1840 she left *Martinique* and took up her abode in *Saint Lucia*, where she was publicly called and known by the name of *Rose Du Boulay* down to the time of her death in 1854. The Respondent continued in *Martinique* till after the death of his Mother, when he removed to *Saint Lucia*, being at that time about the age of nineteen. It does not appear when he first took the name of *Du Boulay*. He certainly had not done so in the early part of the year 1841, for on the 22nd of February in that year (though only nine years old), he stood godfather to a child, and signed the register by the name of *Jules Réné*. In the year 1852, he had a passport granted to him and registered in the Registry of passports for the interior of the Island of *Martinique*, in which he is described as "Mr. *Du Boulay Jules Réné Herménégilde*, seventeen years old." In the year 1855, having then fixed his residence in *Saint Lucia*, he advertised in an Island newspaper his intention to commence business under the firm of *Du Boulay, Brothers, & Co.*, and in the following year he advertised the dissolution of this firm, and his intention to continue the business in his own name. In 1856 the Respondent's Brother

died, and he was nominated administrator of his Brother's succession. Public notice of this nomination was given by the Royal Court by advertisement in the official Gazette, in which the Respondent was called *Jules Réné Herménégilde Du Boulay, alias Herman Du Boulay.* From the time of his use of the name of *Du Boulay,* in *Saint Lucia,* down to the time of the institution of the suit by the Appellants on the 21st of April, 1865, his right to use it was never questioned. During this period he carried on business publicly and notoriously under the name of *Du Boulay,* and the fact must have been well known to all the *Du Boulay* family resident in *Saint Lucia.* The Appellants describe themselves in their plaint as dwelling in the Quarter of *Souffrière,* in the Second District of the Island. The reason given by their Advocate for their not having proceeded against the Respondent sooner, as stated by him upon their authority, is, "that during the period mentioned by the Respondent, those of the members of the *Du Boulay* family who could have protected their family name were in *Europe* for their education, or for other purposes." And "the head of the family, Mr. *Belisle Du Boulay,* was then affected with a chronical disease which deterred him from attending to any kind of business."

It was necessary for the Appellants, in order to establish their case against the Respondent, to shew,—

First. That the existing law of *Saint Lucia* entitled them to maintain their action; and,

Secondly. That delay in asserting their right, or acquiescence in the use of the name of *Du Boulay* by the Respondent, did not prevent their proceeding against him.

Upon the first question, the learned Counsel for the Appellant undertook to prove that by the old French Law which prevails in *Saint Lucia,* a family had a property in their patronymic, and might prevent any person calling himself by their name who had no right or title to do so. For this purpose he quoted a modern work, the *Dictionnaire du Notariat, s.* 3, *tit.* "*De la Propriété des Noms,*" where it is said, "*Le nom que chaque individu porte est pour lui une propriété. Il a le droit de s'opposer à ce qu'il soit pris par un autre. L'usurpation d'un nom donne lieu à une action devant les tribunaux. Cette action est purement civile.*" The learned

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Counsel, upon being pressed for some instance of an action of this description having been brought under the old French Law, confessed that he had no early precedent to produce. The only cases which he mentioned were two, which are to be found in the record of the proceedings. One of them is the case of *De Lacarelle* v. *Darien de Lacarelle*, before the Tribunal of *Villefranche*, in the year 1859, respecting which nothing is stated, except the opinion of the Tribunal, that a person who has the right to bear a name is entitled to prevent another from usurping it, without being compelled to account for the motive of his proceeding; and the other *Lawless* v. *Pierre*, falsely called *Lawless*, before the Tribunals of *Martinique*, in the year 1860, which, like the present, was the case of the assumption of a name after emancipation from slavery.

It is extremely doubtful whether, prior to the *Ordonnance* of 1555 (to be presently mentioned), the assumption of a name by a person who had originally no right to call himself by it, was the subject of any proceeding, penal or civil.

Merlin, in his *Répertoire de Jurisprudence, tit.* "*Nom*," s. 3, after stating that by the Roman Law changes of names were absolutely free, says: "*Il fut un temps en France où conformément à cette loi on changeait de nom sans aucune solennité.*" He then gives a variety of instances prior to 1555, in which changes of name had been made without authority, and without any solemnity. He then proceeds, "*Mais comme cette licence de changer ainsi de nom et d'armes produisait les plus grands abus, le Roi Henri II. y remédia par une Ordonnance donnée à Amboise le* 26 *mars, avant Pâques,* 1555, *art.* 9."

The right, therefore, to bring a civil action in *Saint Lucia* for the usurpation of a family name must be founded either upon this *Ordonnance* of 1555, or upon some law subsequently passed and introduced into the Island. The *Ordonnance* of 1555 gives no right of civil action for an unauthorized change of name; and according to *Merlin*, in the passages just cited, such an action could hardly have been previously maintained. The *Ordonnance* subjects the person changing his name without authority to penal consequences only. It says, "*Pour éviter la supposition des noms et des armes, défenses sont faites à toutes personnes de changer leurs noms, et leurs*

armes, sans avoir obtenu des lettres de dispense et permission, à peine de 1000 *livres d'amende, d'être punis comme faussaires et être exautorés et privés de tout degré et privilége de noblesse.*"

There seems to be great doubt whether this *Ordonnance* of 1555 ever had any practical operation, even in *France*. *Merlin*, in his *Répertoire, tit.* "*Promesse de changer de Nom*," says, the Ordinance not having been registered, never became law in *France*. But *Dalloz*, in his *Dictionnaire*, tit. "*Nom et Prénom*," after mentioning this opinion of *Merlin*, says, "*Mais la Jurisprudence est contraire à cette opinion.*" At all events, it is not shewn that this unregistered *Ordonnance* ever formed part of the law of *Saint Lucia*. It is to be observed that the Chief Justice of *Saint Lucia* founds his judgment in favour of the Appellants upon a different *Ordonnance*, never referring to the *Ordonnance* of 1555 as having any existence, or, at least, as having any bearing upon his decision. He says, "In *France*, under the Law '*De mutatione nominis*,' names were changed according to the whim or caprice of individuals, without any solemnity or formality; but such an unrestrained license brought forth great confusion; names of living families were arbitrarily taken, and towards the commencement of the nineteenth Century, on the 11th of April, 1803, a Law was made to check that dangerous system." And he adds, "It is not amiss to observe that that Law is not only still in force in this Colony, but has been retained entire by the modern Legislators of *France*, and now forms part of the existing Laws of that Country."

Notwithstanding the opinion of the Chief Justice, that the *Ordonnance* of 1803 is in force in *Saint Lucia*, it may fairly be questioned, whether it ever became part of the Law of the Island before it was taken by this Country on the 23rd of June, 1803. On that day a Proclamation was issued which assured and guaranteed to the inhabitants, the full enjoyment of their property, under the laws which existed in the Island at the time immediately prior to the last cession.

It is not very probable that the *Ordonnance* of 1803 was one of these Laws. It was passed in *France* a little more than two months before *Saint Lucia* was brought under British dominion, and not being of any peculiar local importance, it was not likely in the critical position of the French West Indian Colonies at this junc-

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ture that any care would be taken to transmit it, in order that it might form part of the Law of the Island.

If the Chief Justice is right in saying, that this Law was made to prevent persons arbitrarily taking the names of living families, it would seem to shew that before 1803 no civil action could be brought, or at all events, that none was ever brought to protect a family name from usurpation.

If the Law of 1803 is out of the question, it is difficult to see upon what other foundation the Appellants can rest their right to maintain the action. The old French Law, on which their learned Counsel mainly relied, has already been considered. The *Ordonnance* of 1555, or one of a similar description made in 1629, was the only law upon the subject of changes of name at the time of the French Revolution. That *Ordonnance* fell with the Kingly authority. In 1794, during the Revolutionary Government, an *Ordonnance* was passed which absolutely prohibited any change of name, but the learned Counsel was unable to shew that this *Ordonnance*, any more than that of 1803, ever had the force of Law in *Saint Lucia*. He failed altogether in his endeavour to prove that the existing Law of the Island entitled the Appellants to maintain their action, whether he relied upon the old French Law independently of the *Ordonnances*, or upon proof that the *Ordonnances* ever formed part of the Law of *Saint Lucia*, or even if they did, that they gave a family a right to proceed by civil action against a person calling himself by the family name without authority, and to compel him to discontinue to use it.

Their Lordships are unwilling to dispose of the case without adverting to the question arising from the delay of the Appellants in instituting their suit. Supposing an action of this kind to be maintainable, there must be some reasonable limit within which a family ought to be bound to proceed. In the present case, the family of *Du Boulay*, resident in *Saint Lucia*, could not have been ignorant that for ten years the Respondent had been carrying on business openly under the name of *Du Boulay*, that he had been recognised by that name in public acts, and that he had undoubtedly acquired the name by reputation. At what time some of the Appellants were absent from *Saint Lucia*, and when they returned, is left in uncertainty; but the head of the family appears to have been

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continually resident in the Island, and no sufficient reason is assigned for his not taking earlier steps to protect the family name from the Respondent's alleged unauthorized assumption of it. Under these circumstances, whether any other member of the family might have questioned the title of the Respondent to call himself by the family name is unnecessary to be considered, but all the Appellants have placed themselves under a personal exception by standing by (as it is called) and permitting the Respondent to become known to the world by the name of *Du Boulay*. After their long acquiescence, it would be unreasonable and unjust to sanction the attempt of the Appellants to deprive the Respondent of his right to use a name which he had acquired by reputation, and by which alone he had been known in the Island during the whole period of his residence there.

Their Lordships will recommend to Her Majesty that the judgment appealed from be affirmed.

Solicitor for the Appellant: *Wordsworth, Blake, & Harris.*

THE OWNERS OF THE STEAMSHIP "BETA" APPELLANTS;
AND
TOUSSAINT ROLLANDO . . . . . RESPONDENT.

J. C.*
1869
June 14.

THE "BETA."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

*Jurisdiction—Court of Admiralty—*24 *Vict. c.* 10, *s.* 7—*Cause of damage for personal injuries against Ship.*

The High Court of Admiralty has jurisdiction, under the 24 Vict. c. 10, s. 7, in a cause of damage instituted against a Ship for personal injuries.

Order of the Court of Admiralty rejecting the admission of a petition objecting to such jurisdiction affirmed, on appeal.

THIS was an appeal from an Order of the High Court of Admiralty made on a motion by the Respondent (the Plaintiff) to reject

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE and SIR JOSEPH NAPIER.

3 202
Baker Smith v Brown 66 B. 729, 136-7

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the admission of a petition filed by the Appellants (the Defendants) objecting to the jurisdiction of that Court in a cause of damage for personal injury instituted by the Respondent against the ship *Beta*.

The petition set forth, that on the 18th of September, 1866, the Steamship *Beta*, of which the Defendants were the Owners, came into collision with the French Brig, the *Xiste*, which was then lying at anchor off *Broadstairs*, on the coast of *Kent;* that the Plaintiff was, at the time of the collision, the Mate on board the *Xiste;* that he sustained certain injuries to his person by reason of the collision, which were occasioned by the *Beta*, and the negligence of her Master and crew, the servants of the Defendants, in the navigation of the *Beta*, and had instituted the action against the *Beta* for the recovery of damage in respect of such injuries to his person; and the Defendants submitted, that the Court had no jurisdiction to entertain such cause.

The Respondent moved to reject the admission of the petition.

Upon this motion the question arose whether, admitting the statements contained in the petition, the High Court of Admiralty had, under the *Admiralty Court Jurisdiction Act*, 24 Vict. c. 10, s. 7, which enacts, that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any Ship," jurisdiction to entertain the cause.

On the 28th of July, 1868, the motion came on for hearing when the Judge of the Admiralty Court (The Right Hon. Sir *R. Phillimore*) held, that the Court had jurisdiction to entertain the cause, and accordingly rejected the petition, and condemned the Appellants in the costs of the motion, but gave them leave to appeal, which appeal now came on for hearing.

Mr. *C. E. Clarkson* (Mr. *Aspinall*, Q.C., with him), for the Appellants:—

The High Court of Admiralty has not any jurisdiction to entertain a cause of damage for personal injury, under the circumstances set forth in the petition. Section 7 of the *Admiralty Court Jurisdiction Act*, 24 Vict. c. 10, does not extend to personal injuries; the term "damage," used there, means damage done to property, not damage to the person. If the Legislature had contemplated per-

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sonal injuries it would have used express words defining the remedy, as in the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, ss. 503, 504, where it speaks of damage to "goods" and "loss of life or personal injury." The case of *The Sylph* (1), though a claim for damage for personal injury against a Ship under the same section of the Statute, was brought upon an Award made under an agreement to refer the matter to arbitration. The parties there, the Owners of the Vessel, acknowledged the jurisdiction, by their submission to arbitration. The reasons stated by the learned Judge for holding that the Court of Admiralty had jurisdiction in personal injuries were not supported by any previous decision, and were *de hors* the circumstances of the case. Were this Tribunal to hold that such jurisdiction existed, it would create a lien on every Ship into whosesoever hands it might come: *The Bold Buccleugh* (2); which is opposed to the apparent intention of the Legislature, to be collected from the language of the 7th section of the 24 Vict. c. 10.

Mr. *Butt*, Q.C., and Mr. *Pritchard*, for the Respondent, were not called on.

LORD ROMILLY:—

Their Lordships are of opinion, that the Order appealed from ought to be affirmed. The words of the 7th section of the *Admiralty Court Jurisdiction Act*, which had been referred to, clearly include every possible kind of damage. Personal injuries are undoubtedly within the words "damage done by any Ship." The case of *The Sylph* (1), which has been referred to, and in which it was so held, has not been appealed from. There was every reason for the Legislature enacting that which the judgment of the Court below holds to have been enacted. Their Lordships will humbly recommend Her Majesty to affirm the judgment of the Court below with costs.

3 Ad & E. 305

Solicitor for the Appellants: *Thomas Cooper.*
Proctors for the Respondent: *Pritchard & Sons.*

(1) Law Rep. 2 A. & E. 24. (2) 7 Moore's P. C. Cases, 267.

J. C.* 1869 June 19.

THOMAS BYARD SHEPPARD . . . . . Appellant;

AND

THE RIGHT HON. SIR ROBERT JOSEPH PHILLIMORE, Knight, D.C.L., Official Principal of the Arches Court of Canterbury . . . . . Respondents.

AND

THE REV. WILLIAM JAMES EARLY BENNETT, Clerk . . . . . .

1 P.D. 386

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Church Discipline Act, 3 & 4 *Vict. c.* 86—*Dean of the Arches—Letters of Request, Discretion to accept.*

The acceptance of Letters of Request, sent by a Bishop to the Arches Court of *Canterbury*, in proceedings taken under the *Church Discipline Act*, 3 & 4 Vict. c. 86, is not optional with the Dean of the Arches, the Bishop being empowered by the 13th section of that Act to send such cases "to the Court of appeal of the Province, to be there heard and determined according to the law and practice of such Court;" and it is not requisite that the Letters of Request should contain any reason for their being sent.

THIS was an appeal from a Decree or Order of the Official Principal of the Arches Court of *Canterbury*, by which he declined to accept Letters of Request under the hand and seal of the Lord Bishop of *Bath* and *Wells*, made in pursuance of the *Church Discipline Act*, 3 & 4 Vict. c. 86, and by which he requested the Official Principal, his Surrogate, or other competent Judge in that behalf, to issue a citation or decree under the Seal of the Arches Court, citing the Respondent, the Rev. *William James Early Bennett*, a Clerk in Holy Orders, the Vicar of the Parish of *Frome Selwood*, in the County of *Somerset*, Diocese of *Bath* and *Wells*, and Province of *Canterbury*, to appear at a certain time and place to be in such citation or decree particularly specified, and answer to certain articles, heads, positions, or interrogatories touching and concerning his soul's health and the lawful correction and

* *Present*:—The Lord Chancellor (Lord Hatherley), The Archbishop of York, The Bishop of London, Sir William Erle, and Sir Joseph Napier.

reformation of his manners and excesses, and more especially for having offended against the Laws Ecclesiastical of this realm by having, within two years last past, caused to be printed and published within the Diocese of *London* certain works in which he advisedly maintained or affirmed doctrines directly contrary or repugnant to the Articles and Formularies of the United Church of *England* and *Ireland*, the said works being entitled, respectively, "Some Results of the Tractarian Movement of 1833," forming one of the Essays contained in a volume entitled "The Church and the World," edited by the Rev. *Orby Shipley*, Clerk, printed and published in *London* in the year 1867; "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew and Canon of *Christ Church, Oxford*," [2nd Ed.], printed and published in *London* in the year 1867; "A Plea for Toleration in the Church of *England*, in a Letter to the Rev. *E. B. Pusey*, D.D., Regius Professor of Hebrew and Canon of *Christ Church, Oxford*," [3rd Ed.], printed and published in *London* in the year 1868; the Articles to be administered to *William James Early Bennett*, at the voluntary promotion of the Appellant, *Sheppard*, a Parishioner and inhabitant of the Parish of *Frome Selwood;* and, finally, to hear and determine the cause according to the law and practice of the Arches Court.

The Letters of Request did not allege any reason why they should be accepted, but having been brought in, acceptance thereof for the issue of a citation or decree was prayed. On the case coming on, the Dean of the Arches (the Right Hon. Sir *Robert Phillimore*) considered, that as by the law which existed previous to the passing of the *Church Discipline Act* (3 & 4 Vict. c. 86), the Court had an option of receiving Letters of Request or not, that Act did not alter the law. For the Appellant it was contended, that, by the 13th section of that Act, the Letters of Request were sufficient, and that no reason, or ground for referring the cause, was necessary to be set out in the Letters of Request; and that the Dean of the Arches had no discretion in the matter.

On the 30th of April, 1869, the Dean of the Arches gave judgment, declining to accept the Letters of Request, declaring his reasons upon the construction of the *Church Discipline Act*, 3 & 4 Vict. c. 86, s. 13, and holding, that the right of the Dean of the

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Court of Arches to refuse acceptance of Letters of Request, until proper grounds were assigned why they should be accepted, which existed previously to the passing of the *Church Discipline Act*, had not been taken away by that Act; and that the Court of Arches had, therefore, a discretion to refuse the Letters of Request, unless some reason was stated why the Dean should accept them (1).

The appeal was from this decree.

Mr. *A. J. Stephens*, Q.C., and Dr. *Tristram* (Mr. *Archibald* and Mr. *B. Shaw* with them), for the Appellant:—

Upon the sound construction of the 13th section of the *Church Discipline Act*, 3 & 4 Vict. c. 86, the Dean of the Arches is bound to accept Letters of Request from a Bishop, without any reason being assigned in the same. He has no discretionary power. In this case the Respondent is charged with committing an offence against the Laws Ecclesiastical by the publication of a work containing heretical doctrines; and the proceedings against him have been taken under the *Church Discipline Act*, 3 & 4 Vict. c. 86. In accordance with the provisions of sects. 3 and 5 of that Act a Commission has been issued, and a report made thereon. Sect. 13 empowers the Bishop, "if he shall think fit, either in the first instance, or after the Commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of Articles, but not afterwards, to send the case by Letters of Request to the Court of appeal of the Province, to be there heard and determined according to the law and practice of such Court;" and the Judge of such Court is empowered to make orders for expediting such suits. Now, here the option is given to the Bishop to send, but there is no option given to the Judge; he cannot, in the terms of this section, refuse to entertain the cause; and the acceptance, therefore, of the Letters of Request by him is imperative. It is true, that in sect. 4, which provides for the proceedings of the Commissioners, the words "further proceedings" occur, but that expression has reference to the frame of the Commissioners' Report, and not to proceedings to be taken at the discretion of the Bishop: *The Bishop of Hereford* v. *T.* (2). The

(1) See case reported, Law Rep. 2 A. & E. 335.

(2) 2 Rob. Ecc. Rep. 595-605

learned Judge of the Arches claims a discretion in the acceptance of the Letters of Request, which we say, if it ever existed, is taken away by the *Church Discipline Act;* and he refers to the law and practice previous to that Act, and combats at great length, and with great learning, the *dictum* of Sir *George Lee*, in *Butler* v. *Dolben* (1), citing the decision of the Delegates in the case of *Pelling* v. *Whiston* (2), that the Dean of the Arches was bound to receive Letters of Request *ex debito justitia*, though it was in the discretion of the inferior Judge whether he would grant them. It is not necessary to follow the learned Dean of the Arches through his elaborate examination of this case, for we rely on the terms of the 13th section of the *Church Discipline Act*, by which, if he ever had any option, it is clearly taken away. Forms of Letters of Request are given in *Coote's* Ecc. Courts Prac. pp. 126–9, but such forms contain no precedents of reasons being given. In *Head* v. *Sanders* (3) it was held by this Tribunal, that under the *Church Discipline Act* the Bishop had the option of sending a case to the Court of appeal; which, in the Province of Canterbury, would be the Arches Court, by Letters of Request in the first instance; and in *Hawes* v. *Pellatt* (4) it was held, that causes of Church-rate may be removed by Letters of Request from the Commissary of the Bishop to the Court of Arches. Nothing was there said about the option of the Dean of the Arches to accept Letters of Request, and yet that was before the Act, 3 & 4 Vict. c. 86; and the learned Judge himself seems formerly to have been of opinion that he had no such option: 3 *Burn's* Ecc. Law, p. 224, note (*d*) [Ed. by *Phillimore*]. The only authority to be found for the exercise of this option by the Dean of the Arches is in *Steward* v. *Bateman* (5), but there the Letters of Request were presented jointly by the Archdeacon and Chancellor of *Norwich*, and it did not clearly appear which, if either of them, had jurisdiction. The observation in *Sherwood* v. *Ray* (6), that Letters of Request cannot be demanded *ex debito justitia*, is a mere *dictum*, though entitled to every respect; but that case was decided three years before the passing of the *Church Discipline Act*. The

(1) 2 Lee, 312, 317.
(2) 1 Comyn's Rep. 199.
(3) 4 Moore's P. C. Cases, 186; S. C. 3 Curt. 44.
(4) 2 Curt. 473.
(5) 3 Curt. 201.
(6) 1 Moore's P. C. Cases, 397.

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learned Dean also lays some stress on the absence of the reasons which require the initiation of the cause in the Superior Court; but it appears, from an affidavit that we have filed, that since the passing of the Act, 3 & 4 Vict. c. 86, Letters of Request have been applied for and obtained without question or demur in forty-five instances, and that in no case were the reasons given. Before the passing of the *Church Discipline Act* the Letters of Request were mandatory.

Mr. *Walter Phillimore*, for the Official Principal of the Arches Court:—

The Dean of the Arches having been served with a special Citation in this case, has, out of respect to your Lordships, appeared, as he considered it desirable that such an important point should not be decided *ex parte*, as it would have been if he had not appeared. It is for your Lordships to say, whether I shall proceed or not. [Their Lordships intimated that it was desirable that he should support the judgment.]

In the present state of the cause no inconvenience would result from upholding the view of the Dean of the Arches that he has a discretion to accept or refuse Letters of Request. The Judge has not refused the Letters of Request absolutely, but only until some sufficient reason be assigned why he should accept them. The Dean does not contend for an absolute power to refuse Letters of Request, but only where no sufficient reason for his acceptance of them is assigned; and his refusal is clearly reviewable by the Superior Court. As a matter of fact, he has always accepted Letters in cases where Clerks have been charged with immorality, and in many other cases; quite recently, in a case under the *Church Discipline Act*, *The Bishop of Winchester* v. *Wise* (May, 1869), where the Bishop sending the Letters stated as a reason, *inter alia*, that he was unable, by reason of bodily infirmity, to try the case himself. But if no inconvenience could arise from upholding this discretion, much inconvenience will arise from the contrary course. It is one of the most important of a Bishop's duties to exercise a supervision over his Clergy, and it was the especial object of the Act, 3 & 4 Vict. c. 86, s. 13, on which the Appellant relies, to make the Bishop exercise this supervision

by a personal jurisdiction: *Reg.* v. *Bishop of Chichester* (1). This manifest inconvenience must have some influence on the question of the construction of the Act. The Act is one in *in re Ecclesiasticâ;* it imports terms of Ecclesiastical art, and must be construed with reference to general Ecclesiastical Law. It is not true that the Act does away with the old Law by providing a wholly new process; for the old Letters of Request are left, and only the *judex delegans* is changed; while both the Superior and Inferior Courts are altered, the operation of the Act on the Arches Court being to give it greater power and discretion. The theory of a discretion in the Judge, and of that discretion being reviewable by the Superior Court, is well known to Ecclesiastical Law; *e.g.*, in the case of Faculties: *Rugg* v. *Kingsmill* (2). The form of summons to the Defendant to appear consequent on the acceptance of Letters of Request is called a "Decree by Letters of Request," not a Citation. The distinction has been taken that a Citation goes as of right; a Decree is made in the exercise of a judicial discretion: *Notulæ Diariæ,* MS. by Dr. *Audley,* p. 54. The Judge's signature is always required to shew the acceptance of the Letters. A Bond for payment of costs is also required before the Decree by Letters of Request issues. The effect of the acceptance of Letters of Request by the Judge of the Arches in a criminal Ecclesiastical suit is, that he allows his office to be promoted. The office of Judge could not be promoted without his consent; this has been decided on this very Statute: *Reg* v. *Bishop of Chichester* (3). No analogy to the practice of the Ecclesiastical Courts can be drawn from the Common Law doctrine that a jurisdiction given must be exercised: *Sherwood* v. *Ray* (4).

Assuming, that there was a discretion previous to the Statute, the Statute does not take it away. The Statute gives the Bishop a discretion: *Reg.* v. *Bishop of Chichester.* This discretion he can exercise by hearing the cause himself, but then he must first issue a Commission of Inquiry, which must find a *primâ facie* case, or he can send the cause by Letters of Request to the Court of appeal of the Province, but then the Court of appeal, as representing the

(1) 2 E. & E. 226. 6 Jur. N.S. 120
(2) Law Rep. 1 A. & E. 343; S. C. on appeal, Law Rep. 2 P. C. 59.
(3) 2 E. & E. 209. 6 Jur. N.S. 120
(4) 1 Moore's P. C. Cases, 396, 397.

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Archbishop, must have a discretion whether it shall hear the case or not.

There are two constructions which will satisfy section 13 without holding that the intention of the clause was to give the Bishop power to compel the Dean of the Arches to hear the case. First, that, having substituted the Bishop for his Chancellor in the Diocesan Court, it was necessary to provide, that the Bishop should have the same power, as against the subject, of sending the case by Letters of Request as his Chancellor had before. Secondly, that it enables, but does not oblige, the Judge of the Arches to hear the case on Letters of Request without the assignment of a reason "which the Civil or Canon Law doth affirm to be tolerable." Before this Act, the Judge of the Arches would have been liable in penalties for so doing under the Bill of Citations, 23 Hen. 8, c. 9. This Statute has, been construed very strictly: *Porter and Rochester's Case* (1); *Lynche* v. *Porter* (2); *Jones* v. *Jones* (3). [SIR JOSEPH NAPIER referred to *Nixon* v. *The Office* (4).] The Appellant relies on the words "to be there heard and determined;" but the section goes on, "according to the Law and practice of that Court." The Law and practice of the Arches Court was to require reasons; the Law and practice, as set out in *Stewart* v. *Bateman* (5), was, that the acceptance of Letters of Request was in the discretion of the Judge. The Dean of the Arches has a right to insist on its advantage of being an appeal Court, on the same grounds as those on which the Privy Council refuses to retain causes appealed to it on interlocutory matters, though it has a power to do so, and though that power was frequently exercised by the Delegates: *Head* v. *Sanders* (6). In *Brookes* v. *Cresswell* (7) the Judge was speaking of a moral and not a legal control when he refused to control the Bishop's discretion of sending Letters of Request; besides, it is merely a *dictum*. There is no case exactly like the present, where Letters of Request have been sent, since the *Church Discipline Act*. The Act provides the old machinery, Letters of Request, not a peremptory mandate. The Common Law is never

(1) 13 Co. Rep. 4.
(2) 2 Brownlow, 1.
(3) Hobart, 185.
(4) Milward's Rep. (Ir.) p. 390, n.
(5) 3 Curt. 201.
(6) 4 Moore's P. C. Cases, 193.
(7) 4 Notes of Cases, 431.

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taken away by a Statute unless by express words: *Hawkins* v. *Gathercole* (1); *Escott* v. *Mastin* (2); *Viner's* Abr. tit. "Statutes" (E. 6), *pl.* 13, 19, and 132. This rule has been held to have especial force in cases of jurisdiction; the jurisdiction of the Arches Court to refuse cannot be destroyed except by express words. The Bishop, probably, has some good reason for sending this cause by Letters of Request; we only ask that he should state his reason.

The Appellant's Counsel were not called upon to reply.

Their Lordships reserved judgment.

1869
June 30.

THE LORD CHANCELLOR (Lord *Hatherley*):—

Upon this appeal the question has been, whether the Official Principal of the Arches Court was right in declining to accept Letters of Request from the Bishop of *Bath* and *Wells*, at least in their present shape, upon the grounds set forth in his judgment in the Court below.

The Letters of Request appear to their Lordships to have been in all respects valid and sufficient under the provisions of the *Church Discipline Act*, 3 & 4 Vict. c. 86, to bring the case within the cognizance of the Official Principal, if he had chosen to accept them, and to act upon them; and the case depends upon the construction of that part of the 13th section of that Statute therein referred to, whereby it is enacted, in respect of the offences there named, that the Bishop of the Diocese wherein the party accused holds any preferment may, if he shall think fit, send the case by Letters of Request to the Court of appeal of the Province, to be there heard and determined according to the law and practice of such Court.

This 13th section contains one of several provisions made by the Legislature for the purpose of establishing a course for the trial of offences under the Statute, and appears to us to comprise both an enabling and an obligatory purpose.

There is no dispute about the enabling power conferred thereby. For all parties agree that it creates a power for the Bishop to send, by Letters of Request, every case within his cognizance, under this

(1) 6 De G. M. & G. pp. 21, 31. (2) 4 Moore's P. C. Cases, 104, 130.

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Statute, to the Judge of the Court of the Province, if he shall think fit so to do; and, further, that it creates a power for the Judge of that Court to accept such Letters of Request, and to hear and determine, according to the law and practice of his Court, every case which shall be so sent; but the parties differ in respect of the obligatory effect of the clause upon the Judge of the Provincial Court; that is to say, whether it operates to create the duty alleged by this appeal to have been imposed thereby upon him, of accepting the Letters of Request now in question, and of hearing and determining the case sent therewith.

The Respondent contends that the clause does not impose that duty upon the Judge universally, but only in the cases in which he approves of the reason which induced the Bishop to send them, and that in any other case he is under no obligation and under no duty to accept and act upon them.

The Respondent, in the judgment delivered by him, has considered first the law as it prevailed before the *Church Discipline Act* with reference to procedure in the Court of Arches upon Letters of Request; secondly, the law introduced by that Statute.

Upon the first point he came to the conclusion that the Court of Arches, before the passing of the Act, was entitled to refuse Letters of Request unless and until proper grounds were assigned why they should be accepted. Upon the second point he has come to the conclusion, that though the Statute authorized the Bishop to send the Letters of Request to the Court of the Province, it does not enact that the Court of Arches must accept them, or that it may not require reasons to be assigned why it should accept them.

Their Lordships desired the question on the effect of the Statute to be first argued; and they are satisfied, notwithstanding the very able manner in which the contrary view of the case has been put before them, that according to the true construction of the Statute the Judge of the Court of Arches cannot refuse to deal with this case according to the 13th section of the *Church Discipline Act*, pursuant to the Letters of Request.

Assuming, as their Lordships do, for the purpose only of explaining their opinion on the effect of the Statute, that any Bishop on transmitting a cause by Letters of Request to the Court of

appeal of the Province, is bound to state some valid reason why he does not proceed in the first instance to hear and determine the matter in his own Court, yet they conceive that the 13th section of the Statute supplies in itself a reason for his so doing, and renders it imperative upon the Court to "hear and determine the matter." The sections of the Statute which precede the 13th give to the Bishop (as has been observed by the Respondent) greater powers, and greater assistance in the exercise of his powers, to hear and determine cases falling within the provisions of the Act; but the 13th section also expressly provides that it shall be lawful for him, either in the first instance, or after a report by Commissioners that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of Articles, to send the case, by Letters of Request, to the Court of appeal.

On the part of the Respondent it has been ably contended that Letters of Request are a term of art with a known meaning, having been a known instrument for transmitting matters from one jurisdiction to another in Ecclesiastical procedure, and that they are in effect a request which may be refused—and not a command which ought to be obeyed—and that the direction to the Judge to hear and determine a case according to the law and practice of his Court, included the practice of rejecting Letters of Request which appeared to be sent without sufficient reason. He further concluded, on grounds of expediency, that such a case as the present ought to be first heard and determined by the Bishop before it should come to the Court of appeal of the Province.

But these arguments have failed to convince their Lordships that the Respondent is entitled to their judgment, and they have come to the conclusion that the words of the enactment "to be there heard and determined according to the law and practice of the Court" are to be construed according to their ordinary acceptation, and are clear to secure the duty, as well as the power, of so hearing and determining the cases sent.

It appears to their Lordships that it would be a very unreasonable construction of the Act to hold that when it is expressly enacted that the Bishop may send the Letters of Request in order "that the cause may be heard and determined," the Judge of the

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Court to whom such Letters are addressed should first determine, not the cause, but the question whether or not he will hear it.

It is to be observed that the words of the Statute do not merely authorize the Bishop to send Letters of Request, requesting thereby that the cause may be heard and determined, but enable him to send the case itself by Letters of Request to the Court of appeal to be there heard and determined.

The Letters of Request constitute the vehicle by which the case is to be brought before the Court, but when brought thither the case is to be proceeded with as of right.

Their Lordships are of opinion, that had it been intended to give the Court of appeal an option as to whether or not it would hear the case, words to that effect ought necessarily to have been introduced.

The case of *Reg* v. *The Bishop of Chichester* (1), and the *dictum* in *Sherwood* v. *Ray* (2), cases which were cited by the Respondent, do not in any way affect the question before their Lordships. They refer to the commencement of proceedings at the instance of a private promoter. But, on the other hand, it has been decided that after a commission has been issued by the Bishop, and a Report has been made that there is sufficient *primâ facie* ground for instituting proceedings, these must be proceeded with: *Ex parte Denison* (3). Great inconvenience would arise from a construction of the Statute which would arrest the course of justice after the case had been entertained by the Bishop to the extent of issuing a Commission and obtaining a Report. If the Judge of the Court of appeal of the Province can refuse to hear it under the Letters of Request, the Bishop, in the event of a *Mandamus* being applied for against him, may say that he was entitled to the option of sending it to the Court of appeal of the Province, and that he had done so, and the case might, therefore, remain wholly unheard.

The learned Judge has said that it would be strange if the discretion as to allowing a suit to be instituted were vested in the Bishop and denied to the Archbishop; but the same might be said of a case heard by the Bishop and afterwards, on regular appeal,

(1) 2 E. & E. 209. (2) 1 Moore's P. C. Cases, 397.
(3) 4 E. & B. 310.

brought before the Archbishop. The question as to the propriety of the inquiry is not before the Archbishop in either case, but the only question is, whether the Bishop shall first hear it, or send it at once for trial to the Court of appeal. The Statute intended to give an opportunity, where the Bishop thought such a course desirable, of sparing the litigant one hearing.

Their Lordships are further of opinion, that Letters of Request ought not to be regarded as a compulsory command to perform an onerous service, seeing that all exercise of authority in administering justice, according to law, ought to be regarded as a privilege and an honour; and the Bishop, in sending the case, by Letters of Request, to the cognizance of the Official Principal, ought to be regarded as seeking guidance from superior knowledge and judicial powers, rather than imposing on another a burthen, which he should have supported himself without resorting to extraneous aid.

The Letters of Request are no more than the process by which the cause is to be placed in a condition to be heard and determined by the Superior Court.

Sir *Herbert Jenner Fust* appears, in the case of *Brookes* v. *Cresswell* (1), to have taken this view of the Statute, and we conceive it to be the correct interpretation. In *Sanders* v. *Head* (2) he appears to have entertained the same opinion, and the latter case came before the Judicial Committee on appeal, *Head* v. *Sanders* (3), which approved of the decision. Their Lordships, therefore, will advise Her Majesty to remit the cause to the Court of Arches, to be there heard and determined according to the law and practice of the Court.

There will be no costs on either side.

Proctors for the Appellant: *Moore & Currey.*

Proctors for the Official Principal of the Arches Court: *Toller & Sons.*

(1) 4 Notes of Cases, 431. (2) 3 Curt. 42.
(3) 4 Moore's P. C. Cases, 186.

J. C.*
1869
March 2, 4.

DAME ÉMILIE MALVINA EVANTUREL AND ÉDOUARD RÉMILLARD . . . . } APPELLANTS;

AND

L'HONORABLE FRANÇOIS EVANTUREL . RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Lower Canada—Execution of Will—Formalities requisite—Coutume de Paris, Art. 289—"*Dicté et nommé par le Testateur aux Notaires*"—*Construction.*

2 Lafl Cas 131 156

Article 289 of the *Coutume de Paris*, in force in *Lower Canada*, regarding the execution of Wills, enacts:—"*Pour réputer un Testament solennel, il est nécessaire qu'il soit écrit et signé du Testateur; ou qu'il soit passé par devant deux Notaires; . . . . et qu'il ait été dicté et nommé par le Testateur aux dits Notaires . . . . et depuis à lui relu en la présence d'iceux Notaires . . . . et qu'il soit fait mention au dit Testament, qu'il a été ainsi dicté, nommé, et relu, et qu'il soit signé par le dit Testateur, et par les témoins; ou que mention soit faite de la cause pour laquelle ils n'ont pu signer.*"

A Testatrix, domiciled in *Lower Canada*, who was unable to write, sent for a Notary to make her Will, giving him directions as to the dispositions it was to contain, which he took down in writing. The Notary, in conformity with the instructions, prepared the Will and handed it over to her. The Testatrix afterwards consulted a Counsel on the subject of the Will, and he made an alteration in the margin. Two days afterwards the Testatrix went to the Notary's Office, bringing with her the Will, which he perused, and seeing the alteration, drew his pen through it. He then sent for another Notary, and in the presence of the second Notary asked her, what were the dispositions she desired to make, which she expressed briefly to be all the dispositions contained in the Will. The first Notary then read over the Will to her, and she suggested certain alterations, which were made by him in the presence of the other Notary, and in his presence he re-read to the Testatrix the additions and corrections made. As the Testatrix could not write the "*énoncé sacramental*" was as follows:—"*A declaré ne savoir ni écrire ni signer de le requise:*"—

Held (affirming the judgment of the Court of Queen's Bench in *Lower Canada*, on the appeal side), that the execution of the Will was good, and that the requirements of the 289th Article of the *Coutume de Paris* had been sufficiently complied with, as the words "*dicté et nommé par le Testateur aux dits Notaires*" did not require, in express terms, that the Will should be written by a Notary at the time of dictation by the Testatrix.

THE question raised upon this appeal related to the Will of the late *Madame Evanturel*, domiciled in *Lower Canada*, the validity

* *Present*:—SIR JAMES WILLIAM COLVILE, SIR ROBERT PHILLIMORE (THE JUDGE OF THE HIGH COURT OF ADMIRALTY), THE LORD JUSTICE SELWYN, and THE LORD JUSTICE GIFFARD.

Una Cas on same will LR 6 PC 1.

of which depended upon the regularity of its execution, as required by the 289th Article of the *Coutume de Paris*. The Appellants insisted, in the Court below, that the Will was invalid, upon two grounds; first, that the Testatrix had not legal capacity to make such Will, and that it was obtained by fraud and undue influence practised on her by the Respondent. This latter ground was abandoned in the course of the proceedings in *Canada*. And secondly, that it was not validly passed and executed according to the Law of *Lower Canada*. The judgment appealed from (which reversed the judgment of the Superior Court for the Province of *Lower Canada*, District of *Quebec*), sustained the Will, as being duly executed, and valid by the Law of *Lower Canada*.

The facts of the case were as follows:—

The Respondent was the only Son, and sole Executor, and residuary legatee in usufruct of the late *Madame Evanturel;* the Appellant, *Émilie Malvina Evanturel*, was his Sister, who sued with her Husband the Appellant, *Édouard Rémillard*.

The suit commenced by a claim to the succession of the late *Madame Evanturel* (*pétition d'hérédité*), filed by the Appellants in the Superior Court of *Lower Canada*.

The petition alleged, in substance, that *Madame Evanturel* died on the 10th of November, 1863, leaving five children surviving her, namely—one son, the Respondent, *François Evanturel*, and four daughters, *Maria Marguerite Evanturel*, the wife of *Alfred Paré;* *Sophie Evanturel*, the wife of *Louis Timothé Suzor;* the Appellant, *Émilie Malvina Evanturel*, the wife of the Appellant, *Édouard Rémillard;* and *Elmire Aglaé Evanturel*, unmarried; that such five children constituted the sole heirs of *Madame Evanturel*, and that consequently each of them was entitled to one-fifth share of her property; that nevertheless the Respondent had unlawfully possessed himself of the whole of the property of the deceased, to the exclusion of his Sisters; and the petition prayed that the Respondent should be ordered to deliver up to the Appellants one-fifth share of such property, with all profits accrued thereon, and to pay the costs of the suit.

To this petition the Respondent replied by a peremptory and perpetual exception in law (*exception péremptoire en droit perpétuelle*), in which he pleaded the Will in question, dated the 18th

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of May, 1861, made by his late Mother. The Will, the due execution of which was alone in contest, after directing payment of the Testatrix's debts, comprised a donation by Instrument *inter vivos*, which she had executed on the 1st of December, 1860, of a piece of land in *Quebec*, in favour of the Respondent, and giving certain specific legacies and annuities, declared that she discharged her Son from all accounts and claims against him as her Agent or Attorney during her lifetime, and appointed him sole Executor thereof.

The Testatrix was unable to write, though capable of reading to some extent, and in consequence the manner in which the Will (which was in French) was executed was stated on the face of it as follows:—

"*Ce fut ainsi fait, dicté et nommé par la dite Dame veuve François Evanturel, testatrice, aux dits Notaires soussignés, et son présent testament lui ayant été lu et relu par Mtre. Joseph Petitclerc, l'un des dits Notaires, en présence de Mtre. Phillippe Huot, son confrère, pour ce mandé, la dite Dame Evanturel a dit le bien entendre et comprendre, et y a persisté, à Québec, en l'étude de Mtre. Joseph Petitclerc, l'un des dits Notaires, l'an mil huit cent soixante et un, le dix-huitième jour du mois de mai, après-midi, sous le numéro onze mille six cent quatre-vingt six. Et la dite Dame veuve François Evanturel a déclaré ne savoir ni écrire ni signer de ce requise lecture faite et refaite. Soixante-trois mots rayés sont nuls. Trois renvois approuvés sont bons.—Phi. Huot, N.P. Jh. Petitclerc, N. P.*"

The Appellants replied to the Respondent's exception by general answers, affirming their original petition and traversing the exception of the Respondent. And by a special answer they denied the validity of the Will propounded by the Respondent on the grounds of incapacity and undue influence, and also on the ground of insufficient and informal execution.

The Appellants afterwards moved before the Superior Court of *Lower Canada* that they might be at liberty "*de s'inscrire en faux*" against the Will pleaded by the Respondent, to take proceedings for the purpose of shewing that the Will was not duly executed as a testamentary instrument.

An *inscription en faux* is, by the Law of *France* and *Lower Canada*, necessary when a public Testament, or *Testament solennel*, purporting on the face of it to have been duly *dicté et nommé* by

the Testator to two Notaries, is sought to be annulled, as not having been in fact so *dicté et nommé*.

Leave was granted, and they then obtained an Order, according to the ordinary practice when there is an "*inscription en faux*" against an exhibit, that the Will should be lodged in the office of the Prothonotary of the Court. They afterwards filed a statement of their objections to the due execution of the Will, "*moyens de faux.*" The objections so pleaded were as follows:—First, that the pretended Will of the late *Dame Evanturel*, under date the 18th of May, 1861, was not *dicté et nommé* by her to *M. Jh. Petitclerc* and his Colleague, Notaries Public, as falsely alleged in the pretended Will. Secondly, that the pretended Will was not *dicté et nommé* by her to *M. Petitclerc* and his Colleague, Notaries Public, on the 18th of May, 1861, as falsely alleged by the pretended Will. Thirdly, that important parts of the pretended Will (other than the preamble), appeared to be manuscript, written or altered in a strange hand, other than that of either of the two Notaries who passed the Will. On the objections so pleaded issue was joined.

The cause was heard on the 10th of June, 1864, in the Superior Court of *Lower Canada*, before the Hon. *J. T. Taschereau*, Assistant Judge.

In order to support the above objections, the Appellants called as witnesses, *Petitclerc* and *Huot*, the two Notaries before whom the Will was passed, and the Testatrix's legal adviser *Casault*. Their evidence as to the execution of the Will was to the following effect:—*M. Petitclerc*, the family Notary, was summoned by the Testatrix, on the 16th of May, 1861, and went to her in the afternoon of that day. He found *Madame Evanturel* alone, and she said at once that she wanted to make her Will, and then and there dictated her wishes, of which he made a Memorandum. This Memorandum contained, in an abbreviated form, all the dispositions and bequests which appeared in the Will. The Testatrix then told him to draw up her Will according to these instructions, and to send it to her that she might have it examined by her Counsel. He drew up the Will according to these instructions the same day or the day following, and sent it back to *Madame Evanturel*. On the afternoon of the 18th of May, *Madame Evanturel*

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came to his office to execute her Will, bringing with her the draft which had been sent to her; *M. Petitclerc* took it and examined it, and finding some words on the fifth page in a strange hand, he scratched them out at once; he then sent for his Colleague, *M. Huot*, to assist at the execution. On *M. Huot's* entrance, *M. Petitclerc* requested the Testatrix to say what her last wishes were; and she repeated in brief all the requests and dispositions contained in the Will. *M. Petitclerc* took the Will, read it, and having done so, asked *Madame Evanturel* if she wished to add or alter anything. *Madame Evanturel* then made some trifling emendations, and then desired him to add the words which he had already found in the margin, written in a strange hand, to the effect, that if any of her Daughters tried to dispute her Will, the legacy to such Daughter or Daughters should be void and fall into residue; at her request he added these words in his own handwriting, and he and his Colleague verified the addition by affixing to it their initials. *M. Petitclerc* then read the Will once again, and asked the Testatrix to sign, but she declared she could not write. The evidence of *M. Casault* confirmed in every respect that given by *M. Petitclerc*. It was he who had added the words in the margin which were scratched out by *M. Petitclerc*. He was present at the execution of the Will, and said that *Madame Evanturel* then repeated all the dispositions which were contained in the Will in the same way as they were there expressed, without however employing the same words or following absolutely the same order, and that she did this in the presence of *M. Huot*, *M. Petitclerc*, and the witness. *M. Huot* said that *M Petitclerc* asked *Madame Evanturel* what were the dispositions which she wished to make, and she repeated in brief all the dispositions which were contained in the Will. She repeated in an easily comprehensible manner the dispositions which were contained in the Will, as if she knew them by heart; and it appeared from the evidence of *M. Casault* that this witness held the draft Will in his hand, and followed *Madame Evanturel* as she repeated them. Either he or *M. Petitclerc* remarked to her, that there was a note written in a strange hand, and she said that she had instructed *M. Casault* to add it. *M. Petitclerc* scratched out the words in his presence and re-wrote them in his own hand.

As, however, the Appellants persisted in their objection that the

Will had not been *dicté et nommé*, and endeavoured to sustain it by a technical construction of the 289th Article of the *Coutume de Paris*, the Respondent proceeded to shew how the law had been construed in practice. With this view he called one of the principal Notaries of *Montreal* and ten Notaries of large practice at *Quebec*, who all confirmed the mode adopted by *M. Petitclerc* in respect to the execution of the Will, stating that they had seldom, if ever, except in the case of illness or immediate necessity, made Wills in any other way.

The Appellants in the first instance objected to the admission of this evidence, and ultimately endeavoured to neutralize its force by counter evidence of their own. They produced eight Notaries from various Country Districts, who were in the habit when they made a Will of writing it down at once from the dictation of the Testator in the presence of another Notary, or of two witnesses. But it appeared that few, if any, of the witnesses adopted this practice from any idea of its being the only lawful one; on the contrary, it was mostly on grounds of convenience that they acted as they did, their Clients being generally people from the country round, who came into town for the day, and who could not wait or come again when their Wills had been put into proper form, while at the same time the property was generally so small, and the disposition of it so simple, that no peculiar care or consideration would be needed for framing their Wills. Of three Notaries in *Quebec* whom the Appellants called in support of their view, two had but seldom practised as Notaries, and had never had a Will of any importance to draw, and the third, *M. Pruneau*, admitted that he had quite recently drawn up several Wills in the very way in which *Madame Evanturel's* Will was drawn, and his admission was confirmed by the Respondent's witnesses in rebuttal, who had assisted *M. Pruneau* in passing several Wills.

The cause was heard before Mr. Justice *Taschereau*, who, on the 5th of September, 1864, pronounced the following judgment:—

"Considering that the Plaintiffs have failed to prove the allegations of their special answers to the peremptory and perpetual exception in law of the Defendant (*exception péremptoire en droit perpétuelle*) being allegations as to suggestion and captation, of which the Defendant is accused by the Plaintiffs, and as to the

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mental condition of the late *Madame Evanturel*, their Mother, at the moment of the execution of the Will filed in this cause as being that of *Madame Evanturel*, made and executed on the 18th of May, 1861, before *M. Petitclerc* and his Colleague, Notaries Public at *Quebec*, the Court dismisses with costs against the Plaintiffs those parts of their special answers to the exception of the Defendant, by which they plead the facts of suggestion and captation, and of weakness of mind on the part of *Madame Evanturel*. Considering that it is established by the proof given in this cause on the objection to validity (*inscription en faux*) made and filed by the Plaintiffs '*en faux*' against the Will of *Madame Evanturel*, that such Will was not dictated and expressed (*dicté et nommé*) by *Madame Evanturel* to the aforesaid Notaries according to the law. Considering that the fact of having in advance, and upon notes given to a single Notary, and taken by him in the absence of his brother Notary, prepared during the next day the Will of *Madame Evanturel* out of her presence, and having submitted it to her all prepared on a following day, in the presence of the second Notary, in whose presence the Will was read, and read again even after the Testatrix had repeated her dispositions to the Notaries, is not equivalent to the formality required by the law of dictating and expressing the Will, and does not meet the exigencies of the law. Considering that in the execution of a solemn notarial Will the formalities prescribed by the law ought to be strictly observed under the penalty of nullity, and that equivalents ought not to be admitted in their execution, in order to avoid mistakes, errors, and frauds; the Court maintains the objection to validity (*inscription en faux*) made by the Plaintiffs '*en faux*' against the Will as being illegally executed, that is to say: as not having been dictated and expressed by her to the Notaries Public who drew the Will, with costs against the Defendant '*en faux*,' and declares such Will null for all legal purposes."

Against this decision, in so far as it declared the Will invalid, the Respondent appealed to the Court of Queen's Bench of *Lower Canada*. The Appellants also appealed to the Court of Queen's Bench against that part of it which amounted to a decision against them on the merits, namely, on the questions raised by the action, other than that as to the validity of the Will.

The appeal was heard by the Court of Queen's Bench, consisting of the Chief Justice *Duval*, and the Justices *Aylwin*, *Meredith*, *Drummond*, and *Mondelet*, and on the 20th of June, 1865, the Court delivered judgment on the appeal of the present Respondent. This judgment reversed the decision of the Court below pronounced against the validity of the Will, and ordered the present Appellants to pay the costs in both Courts. The Judges were divided in opinion. The Chief Justice *Duval*, and the Justices *Aylwin* and *Meredith*, were in favour of the appeal, those Judges proceeding on the evidence of the Notaries as to usage, but the Justices *Drummond* and *Mondelet* dissented from the judgment of the majority of the Court.

The Appellants applied for leave to appeal to Her Majesty in Council from this judgment before proceeding *en enquête* and for trial of the other issues in the cause, which application the Court refused. The cause was then remitted to the Superior Court, and tried upon the other issues which related to the testamentary capacity of the Testatrix, and the Superior Court, after taking evidence, dismissed the Appellant's action with costs. This judgment was appealed from to the Court of Queen's Bench, appeal side, which Court, on the 18th of March, 1867, affirmed that judgment with costs. The present appeal was from this last-mentioned judgment and the judgment of the 20th of June, 1865.

Mr. *Bowring*, for the Appellant:—

The question involved in this appeal, though of a technical nature, is one of infinite importance regarding the practice and usage of Notaries in preparing and obtaining the execution of Wills in *Lower Canada*, and their consequent validity or invalidity.

The *Coutume de Paris* is the governing law of *Lower Canada*, as regards the passing and execution of Testaments. By Art. 289 of the *Coutume* it is provided, that to the validity of the Testament *solennel*, or public Testament (*pour réputer un Testament solennel*), it is necessary, that it should be written and signed by the Testator, or passed before two Notaries, . . . or a Notary and two Witnesses, ... and that it be *dicté et nommé* by the Testator to the said Notaries, &c., and afterwards to him read and re-read (*relu*) in the

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presence of the said Notaries . . . and that mention be made in the said Testament that it was so *dicté et nommé et relu;* and that it be signed by the Testator and by the Witnesses, or that mention be made of the cause why they have not been able to sign.

In this case the first question of law is, whether the Appellant's *inscription en faux* ought not to have been maintained on all or some of their *moyens de faux.* With respect to the first *moyens de faux:* It is laid down in *Merlin, Rep. de Jur., tit.* "*Faux,*" sects. 1 and 4, that *faux* is an alteration of truth, and an act of *faux* is the strongest ground of nullity: *Perrault* v. *Simard* (1). Here the Notaries committed a *faux* by inserting an untrue statement in the testament, that it had been duly *dicté et nommé* to the two Notaries. In the case of a Testament purporting on the face of it to have been duly *dicté et nommé et relu,* the proper course of proceeding to have the Testament annulled is by an *inscription en faux: Merlin, Rep. de Jur., tit.* "*Inscription de Faux.*" Notaries are competent witnesses to prove the *faux: Routier* v. *Robitaille* (2); *Velling* v. *Parant* (3); *Bourassa* v. *Bourassa* (4). The general principles of French law applicable to Testaments are these:—The right to dispose by Testament is considered a branch of public, not of private Law: *Furgole, Traité des Testaments, Tom.* I., sect. 13, p. 122; *Ferrière, Coutume de Paris, Tom.* III., *tit.* 14, *glos.* 1, No. 13, p. 331 a, and is rigidly guarded by formalities, which are of its very essence: *Merlin, Rep. de Jur.,* sect. II., p. 389 b, *Tom.* XXXII., *voce* "*Suggestion*" [Ed. 1828]. The object of the French Law has always been to prevent the natural rights of legitimate heirs being too readily sacrificed to a Testator's caprice, and in this respect Testaments are distinguished from donations *inter vivos: Ferrière, Coutume de Paris, en Art.* 292, *glos.* 1re, *Tom.* III., p. 388 a, No. 7; *Foullier, Des Don. et Test., Tom.* V., pp. 435—7, No. 446 [Ed. 1839].

The alleged Will was not validly *dicté et nommé* to two Notaries, as falsely stated on the face of that instrument, as is required by the *Coutume de Paris,* Art. 289, and not having been complied with is a nullity. According to the true construction of

(1) 6 Low. Can. Reps. pp. 17, 22.
(2) Stuart's Low. Can. Reps. 440.
(3) 4 Low. Can. Reps. 228.
(4) 17 Ibid. 299.

Article 289, and decisions thereon, the words "*passé par devant deux Notaires . . . et qu'il ait été dicté et nommé par le Testateur aux dits Notaires . . . et depuis à lui relu en présence d'iceux Notaires,*" &c., mean that the Will must be dictated by the Testator to the two Notaries, and then and there, as dictated, written down by one of the Notaries, or, at least, by some one in their presence, and in the presence of the Testator, and then and there read and re-read to the Testator in the presence of both Notaries; the whole being one transaction. In the Court below the Respondent contended, that the Article only meant, that the Testator must declare or acknowledge the Will before two Notaries, and that it need not be written down at the Testator's dictation, or in the Testator's presence, or by one Notary in the presence of the other, or, in fact, by any Notary at all; but we submit, that the Respondent's construction strikes out of the *Coutume* all the most material words, beginning, "*et qu'il ait été dicté,*" leaving, in effect, only "*passé par devant deux Notaires,*" which would, standing alone, have the very same force which the Respondent gives to the entire Article. The Respondent does not explain why the words *dicté et nommé* find their way into all public Testaments; still less why the words *mot à mot* are usually added, though, perhaps, not absolutely requisite. It is of importance to bear in view that the old repealed *Coutume de Paris,* Art. 96, did not contain the words *dicté et nommé: Bourdot de Richebourg, de Coutumes, Tom.* III.; and hence the importance of the meaning attributed to these words under the 289th Article of the new *Coutume de Paris.* It is necessary to ascertain the meaning of the word *dicter* in this Article. The following authorities establish that the word *dicter* always has been interpreted in French Law to pronounce before another that which is to be simultaneously taken down in writing as dictated. In the *Dict. de Trévoux, verbo "Dicter," Tom.* II., p. 773 (*Tom.* III., p. 84 b [Ed. 1752]), it is said, "*Faire écrire à quelqu'un sous soi quelque discours en le prononçant à haute et intelligible voix et mot à mot.*" So in *Ferrière, Coutume de Paris, Tom.* II., p. 256 [Ed. 1762], *Tom.* III., p. 347 a, No. 12 [Ed. 1685], "*Dicter, c'est dire quelque chose à dessein qu'il soit rédigé par écrit;*" *Lemaistre, Coutume de Paris,* pp. 425–6 [2nd Ed. 1741; 1st Ed. *Paris,* 1700]. The above authorities were anterior to the *Ordonnance* of 1735, which,

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the Respondent insisted, introduced for the first time the meaning of writing in connection with "*dicter ;*" *Merlin's Rep. de Jur., voce* "*Testament,*" s. III., ¶ II., Art. 1, No. X., p. 432 b [Ed. 1828], p. 692 b. [Ed. 1809, and *Johnson's* case, there cited, in 1729–30]; *Ib.* sect. II. & III., Art. II., No. 11, p. 448 a. [Ed. 1828], p. 703 b. [Ed. 1809]; *Foullier, Don. et Test.* No. 410, *Tom.* V., p. 380 [Ed. 1839], and No. 413; *Dict. de l'Acad. Française, voce* "*Dicter*" by *Landais, Bescherelle, Fleming, et Tibbins; Discussion du Code Napoléon, Tom.* III., p. 372 [2nd Ed. *Paris,* 1808]. *Burge's* Comm. on Col. and For. Law, Vol. iv., pp. 426–7, and *Colin Délisle,* "*Don. et Test.*" ch. v., pp. 320 b., 330–1–2, 368 b, 370.

The word "*nommé*" adds nothing to the force of the word "*dicté,*" but is included in it; the two forming a compound technical phrase, equivalent to "give and grant," "have and hold" in English Law, and is incapable of being replaced by any synonyme: *Ferrière, Coutume de Paris, Tom.* III., p. 347 a, No. II.; *Ricard,* part I., ch. v., s. 5, No. 1503, p. 338 [Ed. 1685, p. 338]; *Lemaistre, Coutume de Paris,* p. 422. In p. 423 *Lemaistre* says, that according to *Du Plessis* the absence of the word "*nommé*" imports nullity, "because the word '*dicté*' refers to the Notaries, '*nommé*' to the witnesses;" but, according to *Lemaistre,* both words refer to the Notaries, and as they certainly refer to the Testator: it is clear that the words "*dicté et nommé*" imply, that the action of the Testator and the Notaries is co-operative and contemporaneous. But in the Court below the Respondent insisted, that the words "*dicté et nommé*" did not originally imply anything more than to transmit the Testator's Will, and that their meaning has undergone a change since the *Ordonnance* of 1735. The above authorities, however, shew, that the same meaning has always been given to those words under the *Ordonnance* and *Code Napoléon,* as under the *Coutume* which introduced them. The *Ordonnance* of 1735 was, in fact, chiefly passed for the purpose of diminishing the restrictions imposed by the *Coutumes,* whereas, according to the Respondent's contention, the *Ordonnance* first imposed the necessity of writing on the Notaries. Assuming such a construction to be the true one, Art. 289 of the *Coutume* would authorize a Testament by parol. *D'Aguesseau, Lettre du* 30th Dec. 1742, *Œuvres, Tom.* XII., pp. 445–7 [Ed. 1819], fully treats of the purpose the *Ordonnance* had in

view, and Art. 23 of that *Ordonnance* shews, that it did not change the legal signification of the words "*dicté et nomme*," but only restricted the excessively strict construction given to the *Coutume*, as to stating on the face of the Testament, that the requisites had been complied with, and, in other respects, merely states more expressly the old jurisprudence: *Grenier, Don. et Test., Tom.* II.; Mr. Justice *Smith*, in *Dubé* v. *Charron* (1), says "in referring to the *Ordonnance* of 1735, *sur les Testaments*, as representing the old jurisprudence, it is evident that the Law does not require certain sacramental words, if only the substance be exactly preserved."

According to the Respondent's construction of the *Coutume*, it must follow that part of a Testament might be dictated to one Notary one day and another part to the other Notary a month after, each might write down what he chanced to remember of the part dictated to him at an indefinite distance of time, and when the pieces are brought together, and read to the Testator and acknowledged by him, this aggregate will, without more, be a valid Testament, "*dicté et nommé*" to the two Notaries; even if the Testator be unable to read or write. By the same reasoning it would be sufficient for one Notary to read one half and the other the other half of the Testament, each in the absence of the other. It seems to have been forgotten in the Court below, that the sole protection to the Testator and his heirs consists in the presence of the two Notaries throughout the whole transaction, from beginning to end, and this has clearly been the Law and practice from a very early period. *Lamoignon*, First President of the Parliament of *Paris*, shews that the dictation by the Testator, writing by the Notary, and reading, &c. of a public Testament, must all be parts of one transaction: *Arrêtés, Tom.* I., p. 300, Art. LVII. [Ed. 1783]. So *Ferrière, Coutume, Tom.* III., p. 346 b., No. 8; *Ib.*, p. 348 a., No. 17, last par.; *Ib.*, p. 355 b., No. 17; *Ib.*, p. 357 a and b., Nos. 27 and 28; *Pothier, Don. Testam.* ch. I., Art. III., s. 1, p. 301 [Ed. 1778], who says "when a Testament is received by two Notaries, it is indispensable that both be present." This was written under the *Ordonnance* of 1735, but that *Ordonnance*, no more than the *Coutume*, in terms requires both Notaries to be present, and both the *Coutume* and *Ordonnance* require that the Testament be

(1) 5 Low. Can. Jur. 256.

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dictated to the two Notaries, the *Coutume* in terms, and the *Ordonnance* by necessary implication. There are authorities which say, that though both Notaries be present throughout the material part of the transaction, yet the absence of either Notary, for however short a time, would annul the Testament, however immaterial the dictation in his absence: *Duranton, Cours de Droit Français, Lib.* III., § II., *Tom.* IX., No. 66, p. 100. The same reason applies to the *Coutume*, which is not content with saying that the Testament shall be passed before them, but expressly enacts that it shall be "*dicté et nommé*" to them, and the necessity of the presence of both Notaries at the dictation and writing of the Testatrix is treated by the Codifiers of *Lower Canada* as the established Law of the Colony: *Code Civil du Bas Canada, Tom.* II., pp. 344-5, § 95, *bis*. Unless these formalities are observed the Will is invalid. They are intended to prevent fraud, and for the protection of ignorant Testators who cannot write. To permit a Will to be executed as the present would tend to defeat the policy of the law provided by the 289th Article of the *Coutume*. There is another consideration which shews the necessity of the continuous presence of both Notaries throughout the whole transaction. From a very ancient period, according to *Toullier, Tom.* V., pp. 358-9, citing three *arrêts* dated 1651, 1703, and 1771, both Notaries were liable for the consequences of any Testament being annulled as informal and *faux*, for not re-reading the Testament; nor could the second Notary recover over against the primary Notary, even though the neglect was entirely that of the latter, inasmuch as it was the duty of the second Notary to see that the primary Notary did his duty. A Testament brought ready written cannot be *dicté et nommé*, and though read to and approved by a Testator is utterly null: *Papon, Arrêts, tit.* "*Testamens*," LIV. XX., *tit.* 1, "Additions," p. 112 [Ed. 1621]. *Équipollences*, or equivalents, so far as regards the execution of Testaments, are inadmissible under the *Coutume*: *Brodeau, Arrêts Notables, Tom.* II., p. 557 b., No. 15; *Denizart, tit.* "*Testam.*" *Tom.* IV., p. 669 b. [Ed. 1771]; *Merlin, Rep. de Jur., tit.* "*Suggestion*," *Tom.* XXXII., § II., p. 389 b. [Ed. 1828]; *Ferrière, Coutume de Paris, Tom.* III., pp. 346 a., 347 a b., No. 7, who says "*Comme les Juges sont extrêmement scrupuleux pour l'observation des solennités requises dans les Testaments . . ils n'y admettent point d'équipollence.*"

It is clear that, under the *Coutume*, Testaments are not construed, as the Respondent contended, favourably, so far as regards the formalities of their execution: *Ferrière, Coutume de Paris, Tom.* II., p. 182 a., No. 77, has this passage: "*Quoique les dernières Volontés soient extrémement favorables, néanmoins le defaut de la moindre solennité en cause la nullité.*" And *Merlin, Rep., voce* "*Testamens,*" § 2, Art. 4, No. 2, p. 680 [Ed. 1809], shews the true distinction. He says "*Mais dans quels cas les Testamens sont ils favorables? Lorsque parfaitement réguliers dans leur forme il ne s'agit que de savoir ce qu'a voula la Testateur.*" *Bourassa* v. *Bourassa* (1) is a strong case. There the Court of Queen's Bench in *Canada* decided that the requisite of re-reading, though the Testament had once been read through from beginning to end, cannot be supplied by *équipollences,* even by explaining the Testament paragraph by paragraph, and annulled the Testament. The absence of any formality is a ground of nullity: *Dubé* v. *Charron* (2); *Ferrière, Instit. de Justin. Tom.* II., L. II., Tit. X., p. 257; *Coutume de Paris, Tom.* III., p. 343 a., No. 1, 349 b., No. 26 [Ed 1685]; *Domat, Lois Civiles* (Trans. by *Strahan*), Vol. I., p. 524 (of Succession); *Ib.* Vol. II., B. III., p. 26 (of Testaments); *Ricard, Don. et Test., Tom.* I., ch. v., p. 288 [Ed. 1685]; *Bourjon, Droit Commun., Tom.* II., p. 305, No. XIV [Fo. Ed. 1770]; *Guyot, Rep., voce.* "*Loi,*" p. 16. *Furgole, Traité des Testamens, Tom.* I., p. 22, No. 3, says, the omission of the smallest formality suffices to annul the Testament.

In this respect there is no distinction between the law under the *Coutume,* the *Ordonnance* of 1735, and the *Code Napoléon,* Arts. 972 and 1001, *Liv.* III., *tit.* ii., *Des donations entre vifs et des Testamens; Macardé, Explic. du Code Napoleon, Tom.* IV., pp. 13, 16, 63. All are laws in *pari materiâ,* and alike impose nullity; the two latter in express terms, and the *Coutume* by invariable construction and necessary implication. This construction of Art. 289 of the *Coutume* is supported by a great number of *Arrêts,* in which the cases annulled were passed before two Notaries, or Notary and witnesses, but was not *dicté et nommé aux dits Notaires; Brodeau, Arrêts Notables,* and *Ferrière, Coutume de Paris, tit.* XIV., *Tom.* III. p. 346 a., b., *glos.* 6 [Fo. Ed.], cites several cases. A number of other *arrêts* from the year 1566 to 1645 were cited in the Court

(1) 17 Low. Can. Reps. 299. (2) 5 Low. Can. Jur. 255.

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below to establish this interpretation of the *Coutume*, nor is there any decision or authority which shews that a different interpretation ever prevailed in the Courts of *Lower Canada*. The loose practice which appears from the evidence to exist among the Notaries at *Quebec* arises from a mistaken apprehension of the effect of the Stat. 14 Geo. 3, c. 83, s. 10, and the Local Act, 41 Geo. 3, s. 4, which Acts the Respondent in the Court below contended rendered the *Coutume* applicable. It is not so. Section 10 of the above Statute merely empowers any one in *Lower Canada* to dispose of all his property by Will, and the sole reference to the form of such Will is in the words: "such Will being executed either according to the Law of *Canada*, or according to the forms prescribed by the Law of *England*": *Meiklejohn* v. *The Attorney-General of Lower Canada* (1). The *Canadian* Act, 41 Geo. 3, c. 4, merely obviates difficulties which had arisen under the former Act, as to the persons who might be Testators or Legatees, and to the probate of Wills in the English form. It does not affect the forms of Wills or Testaments, but, on the contrary, recognises a distinction between the English Will and *Lower Canada* Testament. Before the 14 Geo. 3, c. 83, no one in *Lower Canada* could dispose of more than a portion of his property, and that Act amended this defect, and is solely confined to that point. Now, according to the ordinary rules of construction, an Act passed for a particular object cannot be diverted to a totally different object with which it has no necessary connection. Both French and English Law coincide in this principle of construing a remedial Statute: *Merlin, Rep. de Jur. voce "Loi,"* § XI.; *"De l'Abrogation des Lois,"* No. II.; *Dwarris* on Statutes, pp. 531, 533, 604 [Ed. 1848]; *Comyn's* Dig., tit. "Parliament," R. 9 a.; *Vin.* Abr., tit. "Statute," E. 6, Nos. 1132, 137. Moreover, the *Coutume* has the force of an express Statute, and is law until revoked: *Ferrière, Tom.* I., p. cxxviii. The 289th article of the *Coutume* cannot have been abrogated by disuse: *Dantoine, Régles du Droit Civil*, p. 156 [Ed. 1742]. And the evidence of the Notaries proves that the requirements of the 289th Article are still in force in *Lower Canada*.

According to the principles of French Law, the fact that the Stat. 14 Geo. 3, c. 83, empowers an inhabitant of *Lower Canada* to dispose

(1) 2 Knapp's P. C. Cases, 328.

of all his property by Will is a reason for construing the *Coutume* more rigidly than ever: *Grénier, Don. et Testam.*, vol. i. p. 18 [4th Ed.] The Testament of *Madame Evanturel* is, of course, void as an English Will, not being signed or attested, and is pleaded as a public Testament valid by the *Coutume*, to which alone the words *dicté et nommé* are applicable. The Act of Geo. 3 left the old public Testament under the *Coutume*, and the English Will, to subsist side by side, neither derogating nor borrowing from the other: *Meiklejohn* v. *The Attorney-General of Lower Canada* (1). The cases cited by the Respondent in the Court below on the construction of the 14 Geo. 3, c. 83, s. 10, are authorities in our favour. Thus, in *Ruiter* v. *May* (2), a public Testament, void by the *Coutume*, because it bore date the 17th, but was partly written on the following day, was held valid as an English Will, being signed by the Testator and attested by three witnesses. So, in *Lambert* v. *Ganvreau* (3), the Will, though good as an English Will, was void under the *Coutume*. As to *Routier* v. *Robitaille* (4), and *Clarke* v. *Clarke* (5), neither case seems to have decided anything as to a compliance with the requisites of the *Coutume*, but both appear to have gone off on a different point. In *Methot* v. *Methot*, heard in 1863, the Testament, purporting to have been *dicté et nommé mot à mot*, was prepared by one Notary from notes taken down by another person as the Testator's instructions, and brought by the Notary ready prepared by him, and approved by the Testator in the presence of both Notaries, and read and re-read, was annulled by Mr. Justice *Stuart*, the Judge of the Superior Court, as not having been *dicté et nommé*, as required by the *Coutume*. Again, in *Bourassa* v. *Bourassa* (6), the Testament on the face of it was perfectly regular in form, and purported to have been *dicté et nommé mot à mot* to one of the two Notaries, both being present at the same time. The pleadings in that case were substantially the same as in the present case. The evidence of the Notaries proved that the Testament was prepared, as here, by the principal Notary, from previous instructions given him by the Testator. It

(1) 2 Knapp's P. C. Cases, 328.
(2) Cited in *Lambert* v. *Ganvreau*, 7 Low. Can. Reps. 300.
(3) 1 Low. Can. Jur. 206; S. C. 7 Low. Can. Reps. 300.
(4) Stuart's Low. Can. Reps. 440.
(5) Ramsey's Low. Can. Reps. 20.
(6) 17 Low. Can. Reps. 299.

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was read to the Testator by one Notary in the presence of the other, and afterwards explained clause by clause, but not otherwise re-read by the primary Notary to the Testator, who declared that he understood and approved it. This Testament was annulled by the Superior Court, and, on appeal, by the Court of Queen's Bench, on the ground that it was not *dicté et nommé*, and was not re-read. This case conclusively establishes the following points: first, that the writing of the Testament by one Notary in the absence of the other is a cause of nullity, even on express instructions given by the Testator himself; secondly, that its expressing the will and intention of the Testator is not relevant to the question of the validity of the Testament; thirdly, the exceeding strictness with which even the re-reading of the Testament is enforced, although in the actual case it was obviously unnecessary; and lastly, that *équipollences* are inadmissible in such a case.

Upon these grounds, and for these reasons, I submit that the judgment of the Court of Queen's Bench of the 20th of June, 1865, setting aside the Appellant's "*inscription en faux*" was erroneous, and ought to be reversed; and the judgment of the Superior Court of the 5th of September, 1864, so far as it annulled and set aside the Testament of the 18th of May, 1861, affirmed, because the alleged Testament was not validly *dicté et nommé* by the Testatrix to two Notaries who passed the same, as required by the law of *Lower Canada*. It also bears a false date. It also contains an addition in a material part in the hand of some person other than the two Notaries who passed the same; moreover, the evidence to prove the custom alleged by the Respondent was illegal and inadmissible, and even if admissible, no valid custom was proved, neither did the Respondent appeal from the judgment of the Superior Court declaring the *moyens de faux* to be pertinent and admissible, and I contend that the judgment of the Court of Queen's Bench of the 18th of March, 1867, affirming the judgment of the 16th of May, 1866, was erroneous, and ought to be reversed.

Mr. *Wickens*, and *M. Langlois* (of the Canadian Bar), for the Respondent:—

The Testament in question was duly executed according to the

practice and formalities required by the Law in force in *Lower Canada*. The law which governed the execution of Wills at the time of the execution of *Madame Evanturel's* Testament, was the *Coutume de Paris*, Art. 289, and the Imperial Statute, 14 Geo. 3, c. 83, which, by section 10, extended to the Canadians the power of making Wills in the English form. The laws in *France* regulating the forms of Wills are, first, the Roman Law; second, the Canon Law; third, the Customs; fourth, the *Ordonnance* of 1735; and fifth, the *Code Napoléon*. In *Lower Canada* the 289th Article of the *Coutume de Paris*, as reformed in the year 1580, prevails; and the Statute, 14 Geo. 3, c. 83, s. 10, as explained by the *Canadian Act*, 41 Geo. 3, c. 4. No doubt the 289th Art. of the *Coutume* is the law to be looked to as governing this question, but the terms there used do not carry out the Appellant's contention. The formality expressed by the words, *dicté et nommé*, introduced by that Article, does not imply that the Testament should be written by one of the Notaries to whom it was dictated (*auquels il est dicté*), nor that it should be written down at the time it was dictated. Neither is there any declaration that the Will must be executed in the manner prescribed, under pain of nullity. The *Ordonnance des Testaments* of 1735, Arts. 5 and 23, which was never in force in *Lower Canada*, has added to the above Article of the Custom the words, "*que les Notaires ou l'un d'eux écrivent les Notaires du testamental qu'il les dictere.*" Before this *Ordonnance* Notaries were in the habit of getting their Clerks to write down the Testaments, and prepared them in advance from verbal or written instructions received from Testators. It is true, that the provisions of the *Code Napoléon* enjoin, that when the formalities there prescribed are to be acted on, they will be required to be strictly complied with, under pain of nullity: Arts. 972, 1001; but there is no such provision in the *Coutume de Paris*, which is alone to be looked at. It is so laid down in *Ferrière, Grand Coutumier*, p. 104, *et seq.*, where the *Arrêts* maintaining Wills, less regularly executed than this, not even dictated by the Testator to the Notaries, are set out: *Ferrière, Coutume de Paris, Tom.* IV., pp. 107, 133 [Ed. 1714]; *Brodeau, sur Loüet, Tom.* II., pp. 609, 613 [Ed. 1762]; *Domat*, Civil Law (Trans. by *Strahan*), vol. ii. part 2, B. III. tit. 1, sect. 3, pp. 17, 18; *Rousseau de Lacombe, Recueil de Jurisprudence, voce "Testament,"* No. 12;

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Berton de Fromental, p. 703; *Rousseau de Lacombe, Commentaire de l'Ord.* 1735, Art. 23, p. 134; *Furgole, des Test., Tom.* I., pp. 91, 92; *l'Ord.* of 1775; *Troplong, des Testaments*, No. 1547; *Merlin, Rep. de Jur., voce. Test.*, sect. 2, § 2, Art. 4, p. 615; *Dalloz, Tom.* XVI., tit. 4, c. 2, "*De l'Écriture par le Notaire.*" The result of the evidence of the Notaries and *M. Casault* in this case is entirely to destroy the second and third "*moyens de faux*" set up by the Appellants, which were, in substance, that the Will bore a wrong date, namely, that of the 18th, on which it was executed, instead of the 16th, when the original instructions were given by *M. Petitclerc*, nor was the evidence, in reality, less damaging to the first "*moyen de faux*," by which the Appellants alleged, that the Will had not been *dicté et nommé* to the Notaries, as the law required. There is no complaint of the Will not containing the intentions of the Testatrix, and there certainly is no ground for the allegation, that *Madame Evanturel* at the time of the execution of the Will was not of sound mind and perfectly capable of disposing of her property; moreover, the Appellants entirely failed to make out that any fraud was practised, or any constraint or undue influence exercised on the Testatrix. [Their Lordships intimated their wish that the argument should be confined to the general practice of Notaries in *Lower Canada* as to execution of Wills.] The evidence of the Experts establishes beyond doubt the fact, that the execution of the Testament was in conformity with the long and unchallenged usage of Notaries in *Lower Canada;* and such usage is good. Laws may be interpreted by usage or practice. In *Desforges* v. *Dufaux* (1) it was held, that in *Lower Canada* a law may be abrogated by disuse, and that the provisions of the *Ordonnance* of 1498 and the *Ordonnance de Blois*, 1579, in so far as they require the presence of a second Notary to the execution of a notarial act, have been so abrogated: *Motz* v. *Moreau* (2). So, by the English Law, Lord *Eldon*, in *Smith* v. *Doe* d. *Jersey* (3), says the practice of conveyancers is of considerable authority, and is to be taken judicial notice of, and Lord *Mansfield* did the same in *Rex* v. *Loxdale* (4). There are cases in *Lower Canada* in which Wills executed in circumstances like the present have been main-

(1) 13 Low. Can. Reps. 179.
(2) 7 Ibid. 147, 170.
(3) 2 B. & B. 599.
(4) 1 Burr. 446.

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tained: they are referred to in *Routier* v. *Robitaille* (1); *Clarke* v. *Clarke* (2). We submit, therefore, that the dictation of the Testament was in accordance with the spirit, and was not contrary to the letter, of the 289th Art. of the *Coutume de Paris*, and that it was valid, and ought to be upheld, under the terms of that Article, even without reference to any supposed usage; and we maintain, that the authorities shew, that a Testament made as this is proved to have been, is in conformity with the Law and customs prevailing in *Lower Canada*.

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The consideration of their Lordships' judgment having been reserved, was now delivered by

SIR ROBERT PHILLIMORE:—

This is an appeal against two judgments of the Court of Queen's Bench of *Lower Canada*—one of the 20th of June, 1865, which reversed the judgment of the Superior Court of the 5th of September, 1864, and the other of the 18th of March, 1867, which affirmed the judgment of the Superior Court of the 16th of May, 1866.

The subject of these judgments and of the present appeal is the validity of the Testament of the late *Marie Anne Evanturel*, Widow, of *Quebec*. She died on the 10th of November, 1863, leaving five children surviving her, amongst whom were the Appellant, *Émilie Malvina*, Wife of *Édouard Rémillard;* and the Respondent, the Hon. *François Evanturel*. These five children, if she had died intestate, would have been entitled in equal shares to her property.

The suit was begun by a claim to the succession of *Madame Evanturel*, entitled *pétition d'hérédité*, filed by the present Appellants in the Superior Court of *Lower Canada* on the 7th of December, 1863.

In answer to this petition the present Respondent, on the 5th of January, 1864, replied by a peremptory and perpetual exception in Law (*exception péremptoire en droit perpétuelle*), by which he pleaded a Testament made by his late Mother, dated the 18th of May, 1861.

To this exception the Appellants replied by a general answer,

(1) Stuart's Low Can. Reps. 440. (2) Ramsay's Low. Can. Reps. 20.

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and by a special replication, in which they impugned the validity of the Testament on the ground of incapacity or undue influence (*fraude, suggestion, captation, menaces, employés par le Défendeur*).

It may be convenient here to state, that this allegation was disproved in the opinion of all the Judges in the Canadian Courts, and has not been insisted upon before their Lordships.

The Appellants in their special replication also relied on the invalidity of the execution of the Testament. The mode of raising this latter issue is, according to the law of *France* and *Lower Canada*, to enter, by permission of the Court, a process which is called *inscription en faux*. The Appellants having duly obtained this leave, filed their *moyens de faux*, which were as follows:—

"First, that the pretended Testament of the 18th of May, 1861, was not *dicté et nommé* by the deceased to two Public Notaries, as falsely asserted in the pretended Testament.

"Second, that it was not *dicté et nommé* by her to two Public Notaries on the 18th of May, 1861, as falsely asserted in the pretended Testament.

"Third, that an important part of the alleged Testament, other than the preamble, was written and altered by some Stranger's hand, other than that of the two Notaries who passed the Testament."

It appears from the evidence that *M. Petitclerc*, a Notary, went to the Testatrix, in obedience to a summons, on the 16th of May, 1861; he found her alone: she told him that she desired to make her Testament; she then and there expressed the dispositions and bequests which it was to contain. *M. Petitclerc* drew up a Memorandum in which they were concisely stated; the Testatrix then told him to prepare her Testament in conformity therewith, and to send it to her in order to its being examined by her Counsel; he drew up the Testament on the same or on the following day. *Madame Evanturel*, on the 17th, had an interview with her Counsel, *M. Casault*, whom it appears that she had consulted on the subject of her Will on the 15th and 16th of May; he wrote in the margin of the Will an alteration, subsequently cancelled and re-written by the Notary; and on the afternoon of the 18th of May, *Madame Evanturel* went to the office of *M. Petitclerc*, bringing with her the draft Testament, which he opened, and on perceiving *M. Casault's*

alterations drew his pen through them; he then sent for a brother Notary, *M. Huot*, who arrived: there was also present *M. Casault*. *M. Petitclerc* then asked the Testatrix what were the depositions which she desired to make, and she repeated in brief ("*en raccourcis*") as *M. Hout* says, "as if she had known them by heart," all the dispositions which are contained in the Testament, though not exactly, it would appear, in the same terms and in the same order. *M. Petitclerc* then read the Testament — she suggested certain corrections, and the addition of the following condition attendant on the bequests to her daughters: "*Et quant à celle ou celles qui voudront contester mon dit Testament, le legs à elles fait de la dite rente, soit non avenu et caduc.*" It appears that *M. Petitclerc* then re-read the Testament with the corrections and addition which have been mentioned; the Testatrix then declared that she could not write, and what Mr. Justice *Taschereau* calls the "*énonce sacramentel*," the essential *formula*, was put in the following words:—[His Lordship read the attestation clause, *ante*, p. 464.]

It may be convenient here to dispose of the two "*moyens de faux*" which relate respectively to the date of the Testament and to the alterations in a strange hand. It has scarcely been contended before this Court that the Testament was *dicté et nommé* on the 16th of May; and such a contention, in their Lordships' opinion, cannot be sustained. The question of the execution of the Testament must be confined to the date of the 18th of May. With respect to the alterations in a strange hand, they are fully accounted for by the testimony of the Witnesses, and can in no way affect the decision in this case.

In the evidence given by the witnesses, *MM. Petitclerc*, *Casault*, and *Huot*, some discrepancies occur, and also in the two depositions of *M. Petitclerc* made at different times; but their Lordships entirely concur with the remarks of Mr. Justice *Taschereau* upon this subject, and are of opinion with him, that their discrepancies are insignificant and do not affect the real and only question in this case, namely, the true construction of the Law which governs the execution of this Testament.

There is no controversy as to what that Law is. It is the 289th Article of the *Coutume de Paris*, as declared by the Parliament of

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Paris in 1580, and it is in these words:—ART. 289.—"*Pour réputer un Testament solennel, il est nécessaire qu'il soit écrit et signé du Testateur: ou qu'il soit passé par devant deux Notaires, ou par devant le Curé de la paroisse du Testateur, ou son Vicaire-Général, et un Notaire; ou du dit Curé ou Vicaire et trois témoins; ou d'un Notaire et deux témoins: iceux témoins, idoines, suffisans mâles et âgés de vingt ans accomplis, et non légataires; et qu'il ait été dicté et nommé par le Testateur aux dits Notaires, Curé ou Vicaire-Général, et depuis à lui relu en la présence d'iceux Notaires, Curé ou Vicaire-Général, et témoins, et qu'il soit fait mention au dit Testament, qu'il a été ainsi dicté, nommé, et relu, et qu'il soit signé par le dit Testateur, et par les témoins: ou que mention soit faite de la cause pour laquelle ils n'ont pu signer.*" *Ferrière, Tom.* IV., p. 73–74.

It is contended by the Appellants that the provisions of this regulation have not been complied with, and that the Testament is, therefore, invalid. They maintain that, according to the true construction of that regulation, and especially of the words "*dicté et nommé par le Testateur aux dits notaires,*" the Testator must declare the dispositions which he desires to make, and that one Notary at least, if not the two, must then and there write down these dispositions, and that, unless this requisition of the law be obeyed, the Testament is null.

This construction of the *Coutume* was adopted by Mr. Justice *Taschereau* in the Superior Court of *Lower Canada;* and, accordingly, he sustained the *inscription en faux,* and pronounced against the validity of the Testament. From this sentence an appeal was prosecuted to the Court of Queen's Bench of *Lower Canada.* That Court reversed this decision, holding that the Testament was duly executed. The Court was composed of five Judges; of these three, Chief Justice *Duval,* Mr. Justice *Aylwin,* and Mr. Justice *Meredith,* delivered their judgments in favour of the validity of the Testament; while two, Mr. Justice *Drummond* and Mr. Justice *Mondelet,* dissented, and agreed with Mr. Justice *Taschereau.* From this sentence the present appeal has been prosecuted.

The case has been fully argued before their Lordships, and we have now to deliver our opinion upon the true construction of the 289th Article of the *Coutume de Paris* in its application to the Testament which is the subject of this litigation.

Some preliminary observations occur which it will be well to mention in this place. First, that the language of this *Coutume* does not require in express terms that the Will should be written by a Notary at the time of dictation; though it does require that the Will should be read over in the presence of the Notaries and of the Testator; and, secondly, that there is no declaration like that which is to be found in the *Code Napoléon*, that the formalities enjoined shall be observed on pain of nullity.

In respect to these particular words "*dicté et nommé*," it appears to their Lordships, that they must be considered as conveying one idea, the latter word being only used to strengthen the former; and in this opinion their Lordships are justified by the opinion of the learned editor of *Ferrière*, and of the decision to which he refers:—"*La première chose à observer est, qu'il faut que le Testament soit dicté et nommé par le Testateur, sur quoi on a demandé autrefois, si des mots équivalants suffisoient, comme proferez de sa propre bouche, il a été décidé qu'ils ne suffisoient pas, la Coutume disant dicté et nommé; mais que si un Notaire ne mettoit que l'un des deux, ou dicté ou nommé, comme ils sont synonimes, qu'il n'y auroit point de nullité.*" *Tom.* IV., p. 133. [Ed. 1714.]

It was admitted by the Counsel for the Appellants that it was not necessary that the Notary should write *mot à mot* the dispositions of the Testament as dictated by the Testatrix, that he might put them in proper language and in proper order, and with whatever amplifications were necessary to give them due legal force and effect, and that the Testatrix might dictate from a written and previously prepared instrument. And their Lordships are clear that this view is correct, having regard both to the reason of the thing, and to the decisions which have been given upon the particular *Coutume*, as well as those which have been delivered upon the far more rigorous language of the Article in the *Code Napoléon*, which are collected in *Dalloz*, vol. xvi., tit. 4, ch. 2, sect. 4, Art. 2, s. 2. (*De l'écriture par le notaire.*)

In forming our judgment upon the general construction of the *Coutume*, one of the primary considerations has necessarily been to ascertain what was the mischief which this Law was framed to remedy, and upon this point there is really no room for doubt.

The authority of the Commentator *Claude de Ferrière* has been

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much relied upon by both parties, and it is entitled to considerable weight in the explication of this law. After mentioning the various ways in which a *testament solennel* may be made under this *Coutume*, he adds: "*Nôtre Coutume outre cela requiere dans les Testamens plusieurs solemnitez, pour empêcher les fraudes et les suggestions. La premiere formalité est, qu'il ait été dicté et nommé par le Testateur à celuy qui l'a reçû. La deuxième, qu'il soit relu au Testateur, et qu'il soit fait mention qu'il a été dicté, et nommé, et relu. La troisième, qu'i soit signé par le Testateur et par les témoins:*" *Ferrière*, "*Coutume de Paris*," *Tom.* IV., p. 18 [Ed. 1714.] And again, the same Author, speaking of a Will made *ad interrogationem alterius*, says: "*La validité d'un testament ainsi fait, dépend beaucoup des circonstances, car les formalitez ne sont pas requises dans les Testamen, pour empêcher de tester, mais pour empêcher qu'ils ne fassent contre la volonté et l'intention des hommes, ainsi il paroît par les circonstances, que la disposition faite ad interrogationem alterius, a été l'esprit de celuy qui l'a faite, elle doit être confirmée, ainsi cela dépend de la prudence des Juges*" (pp. 105, 106).

This mischief of a fraudulent, or false, or extorted, or even suggested, disposition, instead of the genuine expression of the Testator's wishes, is certainly not incurred where, as in this instance, the Testator is asked what his wishes are, where he deliberately expresses them, and where the instrument which contains them, though previously written, is read over to and approved by him. Their Lordships agree with the opinion of Mr. Justice *Taschereau* on this point: "*Il y a peu de doute que dans le cas présent, le Testamen argué de faux en cette cause présenterait à mon esprit une idée très forte de l'expression vraie et complète des volontés de Madame Evanturel.*"

The execution of this Testament not having sinned against the mischief which the Law was intended to prevent, the consideration next in order appears to be, what interpretation did this Law receive from contemporaneous exposition?

This exposition is derived from the "*arrêts*," or judicial decisions on the question, and is evidenced by the usage and practice of Notaries Public.

First, in considering the various *arrêts* cited both in the Courts below and at the Bar before us, we must distinguish those in which

the Testament was merely acknowledged in the presence of two Notaries, though twice read in their presence and approved by the Testator, from the present case, in which there was an actual dictation by the Testatrix of the whole of her testamentary dispositions, though the writing did not follow that dictation. Even with respect to *arrêts* of the former description, there are three reported by *Ferrière:* that of *Machéco,* in 1597; that of *Pisany,* in 1602; and that of *Claude Pollaët,* in 1616, which latter *arrêt* was also confirmed by the Appellate Court, in which the Testaments, acknowledged indeed, and in the last case also signed by the Testator in the presence of two Notaries, but not dictated, were pronounced to be valid. It will be borne in mind that the date of the declaration of the *Coutume,* is 1580; these *arrêts,* therefore, so far as their authority extends, have the force of a contemporaneous exposition.

There are, it is true, on the other hand, various *arrêts* to be found in the Books in which Testaments acknowledged and approved by the Testator in the presence of two Notaries, and twice read over, have been pronounced null, on the ground of their not having been "*dicté et nommé,*" according to the *Coutume;* but there does not appear to be one in which a Testament, *dicté* as this Testament was, has been set aside on the ground, either that the dictation was insufficient, or that the writing ought to have followed the dictation. And lastly, upon this point it is to be observed, that in the cases of *Robitaille* v. *Bonneville* and *Routier* v. *Robitaille* (1), decided by the Court of Queen's Bench for the district of *Quebec,* by Chief Justice *Sewell* and Mr. Justice *Kerr* in the year 1829, in which cases the Testament was "*inscrit en faux*" on the ground that it was not legally executed as a "*Testament solennel,*" that is, not "*dicté et nommé*" according to the Law and as certified by the Notary, Mr. Justice *Meredith* says, and no doubt with perfect accuracy:—"The evidence adduced in that case has been placed before us, and from the depositions of the two Notaries and other evidence, it appears that the second Notary was not present when the Will was written. And yet the Will was held to be a good Will.

"The case went to appeal, and was disposed of, as the Gentle-

(1) Stuart's Low. Can. Reps. 440.

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men of the Bar are aware, upon a different ground, and all that is said in the report respecting the point now under consideration is:—

"'The Court below, however, considered that the Will had been regularly made, and rejected the "*inscription en faux.*"'"

There is no doubt that Jurists, both in *Canada* and in *France*, have differed upon the construction of this Article of the *Coutume*. Their discordant opinions are more or less reflected by the conflicting decisions above referred to, and also by the difference in the practice of Notaries in *Canada*. The interpretation put by the usage of these Officers, who perform a public duty in the preparation of Wills, is by no means unimportant; and the result of the evidence upon this head is, that the practice of the leading Notaries in the principal Canadian Towns of *Montreal* and *Quebec*, greatly preponderates in favour of the mode of executing a Testament adopted in the case before us.

It appears, therefore, to their Lordships that, even if the French authority were admitted to be in favour of the stricter construction of the Article in question, the latter interpretation has, both by decision and by long usage, acquired the force of Law in *Lower Canada*.

The 23rd Article of the *Ordonnance des Testamens* of 1735, and the 972nd Article of the *Code Napoléon*, have been referred to, and the decisions with respect to them were considered by the Judges of the Court below whose opinions were adverse to the validity of this Testament. Their Lordships do not think it necessary or expedient to enter into an examination of these decisions. There is, however, an observation arising from the consideration of these two later acts of French legislation which is, perhaps, not irrelevant to the question before us. The *Ordonnance* requires that the Notaries, or one of them, "*écriront les dernières volontés du Testateur telles qu'il les dictera,*" and the Article of the *Code Napoléon*, that the Testament "*doit être écrit par l'un des Notaires tel qu'il est dicté;*" and a subsequent Article provides that the prescribed formalities shall be observed under pain of nullity. The inference from the insertion of these additional formalities, and of the penalty by which they are guarded in this later legislation, is certainly not unfavourable to the liberal construction of the

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Coutume declared in 1580, under the authority of which the Testament before us was made.

After a careful consideration of the law, and of the authorities applicable to this case, inasmuch as it appears to their Lordships, that the mode in which this Testament has been executed is not obnoxious to the mischief which the *Coutume* intended to guard against, the Testament being the expression of the undoubted wishes of the Testatrix, and inasmuch as the force of contemporaneous exposition, embodied and continued in the practice of Notaries down to the present time, is in favour of the validity of such an execution—an exposition in itself reasonable and sound—and having regard to the principle of the comparatively recent decisions of the Canadian Courts in *Robitaille* v. *Bonneville*, their Lordships will humbly advise Her Majesty that the judgments appealed from ought to be affirmed, the validity of this Testament pronounced for, and the costs of this appeal paid by the Appellants.

Solicitors for the Appellants: *Clarke, Son, & Rawlins.*
Solicitors for the Respondent: *Bischoff, Coxe, & Bompas.*

THE BANK OF HINDUSTAN, CHINA, AND JAPAN, LIMITED, IN LIQUIDATION } APPELLANTS;

AND

THE EASTERN FINANCIAL ASSOCIATION, LIMITED, IN LIQUIDATION . . } RESPONDENTS.

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March 15.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

Joint Stock Company—Indian Act, No. XIX. of 1857—*Winding up—Company's Act, No. X. of* 1866, *s.* 174—*Powers of Liquidators to compromise claims of a class of Contributories—Sanction of Court to compromise.*

A registered Joint Stock Company in *Bombay*, with limited liability, being in the course of voluntarily winding up under the Act of the Indian Legislature, No. XIX., 1857, sect. 69, and the Official Liquidators having entered into

* *Present*:—SIR JAMES WILLIAM COLVILE, THE LORD JUSTICE SELWYN, THE LORD JUSTICE GIFFARD, and SIR LAWRENCE PEEL (Indian Assessor).

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an arrangement for compromise with a class of Contributories, in discharge of their liabilities, for a specific sum, the "Indian *Companies Act*," No. X. of 1866, was passed. By sections 173 and 174 of that Act, power is given to the High Court at *Bombay*, to sanction compromises and arrangements. The Liquidators applied to the High Court, under the aforesaid Acts, to ratify the compromise above entered into, which the Court accordingly sanctioned and ordered. On appeal, *held* :—

First, that under the 173rd and 174th sections of the Act, No. X. of 1866, the power of the Liquidators extended to making a general compromise of claims upon Contributories as a class, abandoning an equal proportion in each case, notwithstanding the differences of position between the Contributories, or inquiring closely into the means of each individual Contributory, and

Secondly, that upon the evidence and the judicial knowledge of the existing state of affairs at *Bombay*, the Court had exercised a just discretion in the investigation, and the Order of the Court sanctioning the compromise affirmed.

The case of *Ex parte Totty* (1), distinguished.

The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Courts in *India*, unless it can be shewn that the Court has acted upon an erroneous principle.

IN this case, the appeal was brought from a decree or Order of the High Court of Judicature, on its appellate side, affirming an Order made by Sir *Joseph Arnould* in Chambers under the 173rd and 174th sections of the *Indian Companies Act*, No. X. of 1866 (2), sanctioning a general compromise between the Official Liquidators and the Creditors of the Respondents' Association in their winding up, and

(1) 29 L. J. (Ch.) (N. S.) 702.

(2) These sections were as follows :— Section 173 enacts, that "the Liquidators may, with the sanction of the Court, where the Company is being wound up by the Court, or subject to the supervision of the Court . . . pay any classes of Creditors in full, or make such compromise or other arrangement as the Liquidators may deem expedient, with Creditors or persons claiming as Creditors, or persons having, or alleging themselves to have any claim, present or future, whereby the Company may be rendered liable."

Section 174 enacts, that "the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, or subject to the supervision of the Court . . . compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present and future, subsisting or supposed to subsist, between the Company and any Contributory, or alleged Contributory, or other Debtor or person apprehending liability to the Company, and all questions in any way relating to or affecting the assets of the Company, or the winding up of the Company generally, upon such terms as may be agreed upon; with power for the Liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities."

directing that all the Creditors should be bound by the compromise, with this variation—that such Order should be subject to the condition that one *Ahmedbhoy Hubibhoy* joined in giving a certain guarantee.

By Act, No. XIX. of 1857, of the Legislative Council of *India*, persons are authorized to form themselves into a Joint Stock Company or Association, with limited liability, for the purpose of Banking or Insurance, upon registration; and provisions are made by section 60, for the winding up of any such Company by the Court, or voluntarily; in either case, the existing Shareholders are made liable to contribute to the assets of the Company to an amount sufficient to pay the debts and liabilities of the Company and the costs of the proceedings, but in the case of a Company with limited liability only, not exceeding the amount unpaid on each share; and section 62, provides, that in the event of a limited Company being wound up by the Court, and not voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding-up, is to be liable in respect of such share or shares to contribute in the same manner as an existing Shareholder. By section 89, power is given to the Official Liquidators, with the sanction of the Court, to compromise any debts or claims, and to execute all acts which might be necessary for the winding-up and distributing assets.

The Respondents' Association was registered under this Act, as a joint stock Company with limited liability, and in 1865, a resolution was passed for voluntarily winding up the Company.

On the 6th of July, 1865, an Order was duly made by the High Court of Judicature at *Bombay*, on its ordinary original civil jurisdiction side, that the Respondents' Association should be wound up by the Court, under the Act, No. XIX. of 1857, sect. 69, and that all suits and proceedings against the Association should be stayed.

By the *Indian Companies Act*, No. X. of 1866, which came into operation on the 1st of May, 1866, fresh provisions were made for the winding up of such Companies; and by sections 173, 174, power is given to the Court to sanction compromises and arrangements between the Liquidators and the Creditors of, or Debtors to, the

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Company, and by sect. 191, this power applies to a limited Company registered under the Act No. XIX. of 1857.

After the making of the above Order *Rowland Hamilton*, and *Nesserwanjee Ardaseer Wadia*, were appointed Official Liquidators, and the winding up proceeded in the High Court.

The original nominal capital of the Respondents' Association was one crore of Rupees divided into 25,000 shares of Rs. 400 each. The capital was subsequently increased by the issue of 25,000 new shares of Rs. 400 each, 12,500 of which were sold at auction, but such sale had not been recognised as legal by the Court, and the issue of the remaining 12,500 was, therefore, contested. The list of claims admitted against the Respondents' Association disclosed debts to the amount of 42 lacs of Rupees, or thereabouts, less securities of the value of about Rs. 85,000 without interest, which would probably amount to 6 to 8 lacs of Rupees, or thereabouts.

A Committee of Shareholders was appointed about March, 1867, to consider the position of the Respondents' Association, and what amount it would possibly offer to the Creditors, and how much the Contributories would be able to pay, when a compromise was proposed by the Contributories and Directors of the Respondents' Association to the Liquidators for the provision of funds to be divided amongst and paid to the Creditors in discharge of their claims, so that each Creditor requiring it might receive the sum of 6 annas in the Rupee on the amount of his debt, without interest, upon the following terms:—

"First, that *Nessowjee Naik, Cassumbhoy Dhuramsey*, and *Ahmedbhoy Hubibhoy*, do forthwith bring in and pay to the Liquidators the sum of 6 lacs of Rupees, and that they and *Premchund Roychund* become purchasers of the assets of the Company, at 6 lacs of Rupees, which assets are to be realized by the Liquidators, and the purchasers are to pay within four months to the Liquidators any balance which may be necessary to make up the said sum or purchase-money of 6 lacs of Rupees, each of the said purchasers being liable for the sum of $1\frac{1}{2}$ lacs only in respect of the said purchase or towards the making up the balance thereof; any surplus realized by the said assets to be paid to the purchasers.

"Second, that a call of Rs. 30 per share, and no more, be paid by all the Contributories mentioned in the list already prepared

by the Liquidators, excepting the names of certain persons holding 11,000 shares, to be prepared and handed to the Liquidators by *Cassumbhoy Dhuramsaybhai, Kessowjee Naik* and *Ahmedbhoy Hubibhoy*.

"Third, that the said *Kessowjee Naik*, acting, as we believe, in concert with other persons, shall guarantee the payment of such further sums, if any, required to make up the payment of 6 annas in the Rupee to any of the Creditors requiring the same, within the like period of four months from the date of the Order of the Judge confirming the said compromise, or authorizing the same to be accepted by the said Liquidators."

The majority of the Creditors assented to the principle of this compromise, and amongst others who so consented were the *Bank of Bombay*, who were Creditors for 16 lacs of Rupees or thereabouts; the *Asiatic Bank Corporation*, whose claim for 8 lacs of Rupees or thereabouts had been compromised at a cost of less than 6 annas in the Rupee; the *Central Bank of Western India*, Creditors for 5 lacs of Rupees or thereabouts, had signified their willingness to accept a compromise of considerably less than 6 annas in the Rupee, against which Bank the Respondents' Association had a claim for calls on shares, but which might be difficult to enforce; the *Agra Bank* were Creditors for Rs. 75,000, the *Indo-Egyptian* were Creditors for Rs. 98,739, the *Bank of Surat* and *Bank of Guzerat* were Creditors for Rs. 52,796, the *Financial Association of India and China* were Creditors for 1 lac 97,589 Rupees, and were all willing to accept a compromise of less than 6 annas in the Rupee, provided that a prompt settlement could be made; the representatives of the late *Darashaw Dorabjee Rundana*, who was a creditor for Rs. 45,000, and the trustees of the estate of *Navulchund Nahalchund*, were also willing to accept a compromise of much less than 6 annas in the Rupee. There were also twelve small Creditors, who had signified their willingness to consent to a compromise. The *European Assurance Company*, who were Creditors for Rs. 30,000, the head office of which is in *London*, had no power in *Bombay* to compromise, but the compromise had been recommended by the *Bombay* Board to the Board in *London*. Of the other Creditors, the amount of whose claims were about Rs. 22,000, nearly all were prepared to accept similar compromises.

The Appellants, who were in liquidation under the Court of

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Chancery in *England*, and who were Creditors for 5 lacs 17,000 Rupees, or thereabouts, the Liquidators of which Bank were resident in *London*, instructed their Agent in *Bombay* not to accept any compromise, but to press for payment of their claim in full; and Mr. *Michael Hugh Scott*, a Creditor for 2 lacs of Rupees or thereabouts, required a composition of a larger sum than 6 annas in the Rupee; and Sir *William Gordon*, another Creditor for Rs. 25,000, declined, through *Scott*, to accept a composition; and these were substantially the only Creditors who objected to the compromise.

In an affidavit made by the Liquidators, it was stated, that the Contributories contended, that the winding-up of the Respondents' Association was proceeding under the Order of the 26th of July, 1866, or under the resolution for the voluntary winding-up before referred to, and that a very large proportion of the Shareholders, who would be best able by their position and means to contribute towards the payment of the debts of the Company, and who were on the list of Contributories as past and not present Members, would be absolutely discharged from all liability as Shareholders. That the Official Liquidators had consulted with the Committee of Shareholders before mentioned, and with other persons, and upon an examination and inquiries as to the position of the Debtors or Contributories under the winding-up, and also as to the value of the securities held, arrived at the following results:—First, that the offer, on the terms before mentioned, of 6 lacs of Rupees for the assets of the Company, was a fair one. Second, that if the argument of the Contributories was well founded, the list of Contributories, as it would then stand, would not produce more than a sum varying from 3 to 4 lacs of Rupees. Third, that if it should be decided by the Court, that the Order made on the 6th of July, 1865, for the winding-up of the Company by the Court, was revived by the Order of the 25th of July, 1866, the list of Contributories, which would then be settled as it had already been prepared and filed in Court, would not, as the Liquidators verily believed, in consequence of some of the principal Shareholders being beyond the jurisdiction of the Court, and of the impoverished circumstances of those who are resident in *Bombay*, be likely to produce a larger sum than 8 to 10 lacs of Rupees. Fourth, that the

call of Rs. 30 per share, which the Contributories had agreed to pay if the compromise mentioned was carried out, had been estimated by the Committee of Shareholders and others to produce a sum varying from 2 to 3 lacs of Rupees; in which estimate they concurred. For these reasons, the Official Liquidators were of opinion that it would save great delay and expense, and would be very much to the interest of the general body of Creditors, if the terms of the proposed compromise could be accepted and carried out. The affidavit then went on to state, that having special regard, therefore, to the very great delay and expense which would attend further litigation with the Contributories, who assumed a very strong position on the point before mentioned, and, further, considering that a very large majority of the Creditors assented to the proposition of a compromise for the speedy settlement of their claims, the Liquidators were clearly of opinion, that it would be very much to the interest of the general body of Creditors of the Company that the compromise should be adopted, and the acceptance of the same compromise by the Liquidators of the Company (to be carried out by proper deeds to be executed by and between the parties) should be sanctioned by the Court.

Thereupon an application was made to the High Court to sanction such compromise, and after reading certain affidavits and hearing the parties in Chambers, Sir *Joseph Arnould*, on the 26th of June, 1867, ordered, under sects. 173 and 174 of the *Indian Companies Act* No. X. of 1866, that the compromise should be sanctioned and that all the Creditors should be bound thereby.

The Appellants, who were Creditors to a large amount, appealed against this Order to the High Court on its appellate side, when the above Order was affirmed.

The Judges of the Appellate Court of *Bombay*, consisting of the Chief Justice, Sir *Richard Couch*, and Mr. Justice *Westropp*, in their reasons for sanctioning the compromise, said :—"At the close of the argument, we intimated that the compromise might be made satisfactory to us if some security were given for the performance by *Kessowjee Naik* of his guarantee. We have now been informed by Counsel for the Liquidators, that he declines to do so solely on a point of honour, but that *Ahmedbhoy Hubibhoy* has consented to join in the guarantee, and to execute the Deed. We are of opinion,

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that, with this addition to its terms, the compromise which has been sanctioned by the learned Judge should receive the sanction of this Court. The question is a peculiar one, and the compromise not of the ordinary character which is contemplated in sect. 174 of the *Indian Companies Act* of 1866. If the proposed compromise had been with a class of persons who had been finally determined to be Contributories, and the only questions had been how much they should be required to pay, and what their means of paying the calls for which they were liable might be, the case would have been less difficult, and the decisions of the Courts in *England*, and the *dicta* of the Judges there which have been cited by Counsel, would have been applicable. In those cases the Contributories were ascertained; but this is a case in which, in the present state of things, it is uncertain who may be ultimately liable as Contributories. The determination of that liability is a question of considerable difficulty. If it were at all clear, that the compromise might not be advantageous to the Creditors, the Court might consider that the decision of the learned Judge ought to be reversed, and the sanction to the compromise withheld; but it is possible, that the result of our doing so might be very unfortunate for the Creditors of the Company. The question of the liability of the Shareholders cannot be settled without a very considerable delay, and we must regard the result of any litigation on that point as very uncertain. Indeed, we might say more than uncertain, as regards the interests of the Creditors, for there is a decision of Sir *Joseph Arnould* in the case of another Company, which is opposed to the view of the question which would be beneficial to them, and this decision has not been appealed against. If the compromise were not made, and the view of the law taken in that case were finally adopted, it would seem that the Creditors would be injured by the question having been raised. Whatever the result might be, the Creditors must be kept out of their money for some time; nor can we ignore the probability that, after the delay which would be caused by litigating the question, the persons who may ultimately be held to be Contributories may be unable to pay the calls; great changes may occur in the interval; and when the liability is established, many of the persons may have left *Bombay*, and be at such a distance that the Liquidators could not prudently

attempt to enforce payment from them. It is necessary that all these circumstances should be considered by the Court. From what we have heard in the course of the discussion of this case, and from the answers to questions put by us to Counsel, it appears to us, supposing the result of the litigation as to the liability as Contributories to be most favourable to the Creditors, to be at least very doubtful, whether a much larger sum will be realized from the persons who may be held to be Contributories than would now be given to the Creditors under the present arrangement. It is a very material element in the consideration of the question before us, whether, when the possibility of gain to the Creditors is so small, it is really worth their while to run the risk of litigation; and whether it would be right for this Court, when a large majority of the Creditors are unwilling to run the risk, to force them to do so, because two Creditors wish it. We do not think that we should be justified in doing that. We have felt the question to be one of considerable difficulty, but have at length arrived at the conclusion, that we ought to sanction the compromise, as one by which a most troublesome and, we may say, dangerous litigation will be avoided. Considering the peculiar nature of the case, we do not think it is necessary that we should direct any further inquiries to be made as to the means of the persons who may be liable as Contributories. All the parties who have appeared in the case, except the Liquidators, should bear their own costs, and the costs of the Liquidators should be paid out of the estate."

The appeal was from the Decree or Order made thereon, dated the 27th of September, 1867.

Sir *R. Palmer*, Q.C., and Mr. *Leith*, for the Appellants:—

The first question is, whether the High Court had any jurisdiction at all to make the Order appealed from. The proceedings for the compulsory winding up of the Company was nothing more than a continuance of the voluntary winding up which had begun under the Act, No. XIX. of 1857, before the Act of the Indian Legislature, No. X. of 1866, came into operation. Section 221 of the latter Act expressly enacts, that it shall not apply to a voluntarily winding up begun before the passing of the Act. It is clear, therefore, that the Act of 1866 does not apply to this case, and

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the Order appealed from cannot stand, as the Indian Act, No. XIX. of 1857, does not confer the same powers to compromise as are in the Act No. X. of 1866. Secondly, assuming that the Act, No. X. of 1866, does apply, then we submit, that the Order of the Court below cannot be maintained. It is under the 173rd and 174th sections of the latter Act that the compromise is sanctioned by the Court. Those sections are substantially the same as sections 159 and 160 of the Imperial Statute, 25 & 26 Vict. c. 89, but those sections are intended only to apply to an arrangement between the Liquidators representing the Company and any "Contributory, or alleged Contributory, or other Debtor." Now, as the word "Contributory" is used in the singular number, it is patent that only individual Contributories are meant, and a general compromise of liabilities of Contributories as a class is not contemplated, or within the purview of the 174th section of the Act, No. X. of 1866. Whenever the Legislature intends to deal with Creditors as a class, the word "classes" is expressly used. *Ex parte Totty* (1) is an authority to shew, that a compromise by Liquidators for a fixed sum, to be paid by an aggregate class of Contributories, will not be sanctioned by the Court, unless it is shewn, that the compromise is founded upon the basis of each individual's personal liability, and, in substance, constituted a compromise with each Contributory. Here there is no proof that each individual Contributory's means of paying have been ascertained by the Liquidators. Neither had the High Court power or authority under any of the sections of the Act, No. X. of 1866, to make an Order directing that "all the Creditors of the said Association be bound by the said compromise," or to affect, prejudice, or in any manner restrain the Appellants, or their legal rights under that Act, which included, in respect of their admitted claims, a rateable proportion of the whole of the assets, including the unexpended and available subscribed capital of the Company. The Appellants are a limited Company, having its domicil in *England*, and at the time in course of being wound up under an Order of the Court of Chancery in *England*. Moreover, it sufficiently appears that the compromise was partial and unfair towards the Creditors of the Association, that there was not sufficient proof before the Court on disputed and material

(1) 29 L. J. (Ch.) (N.S.) 702, 712.

points affecting the same, in order to form the elements of, and to enable the Court to arrive at, a safe and correct judicial opinion as to the advantages or disadvantages to Creditors of the proposed compromise, even if such opinion could have been acted upon where there was no legal power or authority in the Court to bind dissentient Creditors.

Mr. *Mellish*, Q.C., and Mr. *Graham Hastings*, for the Respondents:—

As the winding-up Order of the 26th of July, 1866, purports to be made under the Acts of the Indian Legislature, Nos. XIX. of 1857, and X. of 1866, s. 162, and has not been appealed from, the Appellants cannot now object that the latter Act does not apply to the proceedings had under the Act, No. XIX. of 1857. The compromise made by the Liquidators and sanctioned by the Court was within the scope of the powers given by the 174th section of the Act, No. X. of 1866. The construction put by the Appellants cannot be supported. It could not have been the intention of the Legislature that compromises should be made with individual Contributories alone, and not with classes. An inquiry by the Liquidators into the circumstances of each individual Creditor was not necessary. It was very uncertain who might be ultimately liable as Contributories, and that could not be settled without delay and litigation, which would have probably led to the loss of a large part of the calls or payments which may now be obtained from the Contributories. The proposed compromise is reasonable and fair, and for the benefit of the Creditors, as the purchasers were anxious to abandon their bargains. All the Creditors approved of it except three. The Liquidators must be at liberty to act upon general considerations in compromising with a class of Contributories, and to take advantage of their local knowledge of the impoverished circumstances of the Native residents in *Bombay;* and the High Court, who had the best opportunity of knowing the state of mercantile affairs there, approved of the compromise recommended by the Liquidators. *Totty's Case* (1) is distinguishable, and does not apply. There the compromise made by the Liquidators was as to the liability of certain Shareholders; those Shareholders insisting, as a condition, that the

(1) 29 L. J. (Ch.) (N. S.) 702.

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data upon which the compromise was founded should not be divulged, and it was shewn that it was founded upon details of property and circumstances, which if known, would be detrimental to the interests of the Company, therefore, the Court refused to sanction the compromise made by the Official Liquidators, on the ground of such a secret understanding. The *Risca Coal and Iron Company* (1) is in point. In that case it was held, that the general power to compromise debts and claims given by sect. 90 of the 19 & 20 Vict. c. 47, to the Official Liquidator of a Company, with the consent of the Court, is not restricted by the powers given by the 20 & 21 Vict. c. 14, s. 16, nor the 21 & 22 Vict. c. 60, s. 19; and that the Court had jurisdiction to sanction the compromise of any claim made against the Company if it should consider it expedient and beneficial, having regard to the interest of all parties, so to do. Section 174 of the *Indian Act*, No. X. of 1866, is substantially the same as the 160th section of the *Companies Act*, 25 & 26 Vict. c. 89. As the matter was one of discretion vested in the Court below, unless it has proceeded upon a wrong principle, this Tribunal, according to the principles it has acted upon, will not take upon itself to decide the point, whether the compromise was or not beneficial to the Creditors.

THE LORD JUSTICE SELWYN:—

In this case their Lordships must assume the validity of the Order of the 26th of July, 1866, against which no appeal has been presented, and by which the *Eastern Financial Association* has been ordered to be wound up. This Order is the foundation of the proceedings, and assuming its validity, there are two questions raised by the present appeal; first, whether the compromise which was sanctioned by the Order of the 26th of June, 1867, was one which the Court was competent to sanction; and secondly, whether the Court, assuming it to have the power, ought to have exercised that power under the circumstances of this case.

The words of the 174th section of the Indian Act are, "That the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all

(1) 31 L. J. (Ch.) (N. S.) 283.

claims, whether present or future, subsisting or supposed to subsist, between the Company and any Contributory or alleged Contributory, or other Debtor or person apprehending liability to the Company; and all questions in any way relating to or affecting the assets of the Company, or the winding up of the Company generally, upon such terms as may be agreed upon with power for the Liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharge in respect to all or any of such calls, debts, or liabilities." These words are very wide and general, and they are similar to those contained in section 160 of the *English Winding-up Act* of 1862. It may be conjectured, that the great amount of costs and expenses incurred in the winding up of these Companies induced the Legislature to increase the powers of the Court with respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this section, especially the words "liabilities to calls, debts, and liabilities capable of resulting in debts, subsisting or supposed to subsist," and the words "alleged contributory," plainly shew that the compromises intended to be sanctioned might be entered into before the list of Contributories had been settled, or the liabilities or competence of the Shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with Contributories or alleged Contributories, and consequently that it is a compromise within the words of the section in question.

The authority of the case of *Ex parte Tottie* (1) has been much pressed upon the consideration of their Lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states that "A Company was being wound up compulsorily, after an abortive attempt had been made to wind it up voluntarily, and the Official Liquidators agreed with thirty-five Shareholders to compromise their liabilities for a fixed sum, those Shareholders insisting as a condition that the *data* upon which the compromise was founded should not be divulged. The compromise was sworn to be founded upon details of property and circumstances, which if made known would operate detrimentally to the thirty-five Shareholders and to the interests of the Company.

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The Official Liquidators applied to the Court to sanction the compromise under that condition, in pursuance of the 19th section of 21 & 22 Vict. c. 60, some of the Creditors opposed on the ground of the *data* not being stated, and the application was refused, with costs;" and on appeal the decision was affirmed. But in that case, there was no question as to the liability of the thirty-five Shareholders; the question was as to the amount which was likely to be recovered from those thirty-five Shareholders, and that, of course, was the question which the Court had to decide when it came to consider whether such a compromise was advisable or not; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions; first, whether these persons who are alleged to be Contributories are Contributories at all? and secondly, whether, assuming them to be fixed upon the list of Contributories, they would be able to pay any, and if any what, proportion of the amount of the calls which might be made upon them?

Now, the first of these questions, viz., whether they are Contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding-up. That is a most material point, upon which the ultimate determination of the question, as to who are the persons liable to be fixed upon the list as Contributories, would depend. All the facts relating to that point are apparent upon the affidavits and upon the Orders of the Court itself; for in truth it mainly depends upon the effect which is to be given to the very singular orders which appear to have been made for the winding up of this Company; there having been a winding-up order in the first instance, then a proceeding in the nature of a voluntary winding up, then a discharge of the former Orders, and then ultimately the Order of the 26th of July, 1866, which is the foundation of the present proceedings. Now, all these matters were perfectly patent to the Court, and to all the Shareholders; and they gave rise to the doubt which existed as to the date at which the winding up of this Company ought to be considered as commencing.

So also with respect to the competency of the Shareholders.

The Judges had before them, on the evidence in this case, and from their knowledge of the then state of circumstances existing at *Bombay*, reason to doubt whether the persons who were on the list of Contributories, as alleged Contributories, would be able to pay any considerable sum, supposing they were ultimately fixed upon the list. In the present case, therefore, there was no agreement for secrecy, there was no object in secrecy, there was no attempt at secrecy; everything was brought fairly before the attention of the Court; and consequently, in the opinion of their Lordships, the case of *Ex parte Tottie*(1) cannot be considered an authority inconsistent with the decision at which the Indian Court has arrived.

That brings us, then, to the consideration of the second question, viz. whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now, the power is, as has been already said, one of so wide and extensive a character that it is doubtless one which ought to be exercised with very great caution; but, on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in *India* when two Courts there had arrived at the same conclusion in such a case as this, unless it could be shewn that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution. The fact of the opposition of the present Appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the Official Liquidators. All the Creditors had due notice of the intention to bring this question before the Court, and the Appellants themselves were heard by Counsel in opposition to the Order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the Creditors in *Bombay*, that is, all the Creditors who had the best means of forming a judgment upon the question,—at all events, upon the second of the two questions, viz. the competency of the Shareholders, assuming them to be fixed upon the

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list,—all of these Creditors assented to the terms of the compromise. From the first there were only three Opponents, and of these, the present Appellants, who are themselves a Company under liquidation, alone appear here before their Lordships; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this Appellant Company, now under liquidation, had sent out orders to *Bombay* not to accede to any compromise whatever. In addition to this, Mr. *Hamilton*, one of the Official Liquidators, states in his Affidavit that he, after the retirement of another Liquidator, considered himself as bound to act, and that, in point of fact, he did act, as protector of the interests of the Creditors. He says that he has given careful consideration to all the circumstances of the case so far as they bear upon the question of the advisability of this compromise, and that in his judgment there is no doubt that it is one which is very advisable, having regard to the interests of the Creditors. He says that all the Books of account had been from the first open to the inspection of the Creditors, and that some of the principal Creditors have, in fact, for a considerable time retained possession of some of the Books and accounts, or copies of them. No question has been raised as to the *bona fides* of all or any part of the proceedings which are now before us; all the material circumstances of the case were brought at the time to the attention of the Court, and were matters in respect of which the High Court of *Bombay* was much more competent to arrive at a satisfactory conclusion than this Board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the Order in question, and in the second, as they see no ground for controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the Creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the Order of the High Court of Judicature at *Bombay* ought to be affirmed, and this appeal dismissed with costs (1).

Solicitors for the Appellants: *Ashurst, Morris, & Co.*
Solicitors for the Respondents: *Halse, Trustram, & Co.*

(1) See *In re Commercial Bank Corporation of India and the East*, Law Rep. 8 Eq. 241, where a similar Order was made.

MESSRS. DROEGE AND COMPANY . . . APPELLANTS; J. C.*

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MESSRS. SUART AND SIMPSON . . . . RESPONDENTS. *June* 14, 15.

THE "KARNAK."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Bottomry Bond—Authority of Master to resort to—Necessity—Communication with Owner—Liability of Vessel in Foreign port to arrest—Freight part paid in advance.

The extent of the authority conferred on the Master of a Vessel to bind the Owners either of the Ship or cargo, is derived from, and governed by, the law of the Flag; and the existence of the necessity which the Maritime Law requires to validate the hypothecation of the Ship and cargo by bottomry, is to be ascertained by evidence in the usual manner. The meaning of the term "necessity," in respect of hypothecation by the Master, being analogous to its meaning in other parts of the law.

The Master of a Vessel, chartered from *Galveston, U.S.*, to *Liverpool*, received before sailing from the Charterer various sums in part payment of the freight, and after taking on board a cargo, sailed for the port of destination. The Vessel, having in the prosecution of her voyage met with bad weather, and suffered damage, put into *Bermuda*, where the Master incurred heavy expenses for repairs and supplies. The repairs were executed, and the supplies furnished, without any promise of a Bottomry Bond; but the law of *Bermuda* giving a right of arrest of the Ship to the Creditors for the repairs and supplies, the Master, to complete the voyage, having written to the Agent of the Owners, of the Ship, and of the cargo, and not receiving any answer within the time an answer might have been returned, raised the funds necessary for the payment for such supplies on bottomry of the Ship, cargo, and freight. On a suit brought by the Assignees of the Bond, the owners of the Ship not opposing, the Court below pronounced for the validity of the Bond, so far as it regarded the Ship, cargo, and freight, and the Ship was thereupon sold, but produced a sum far less than sufficient to cover the sum due on the Bond. The Consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest and insurance, advanced by them in part payment before the commencement of the voyage, and paid the freight, short of that amount, into Court. The Court below disallowed this abatement, and ordered the whole freight to be paid into Court. On appeal:—

Held, by the Judicial Committee, (1) that, in the circumstances, the Master

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, AND SIR JOSEPH NAPIER, BART.

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was warranted in resorting to a Bottomry Bond, and that the necessity of the case warranted the hypothecation of the cargo as well as the Ship and freight, but, (2) as the latter was, by the agreement between the Charterer and the Master, in part paid in advance, the retention of the amount of such prepayment by the Consignees of the cargo, upheld, as the Master by hypothecating the chartered freight could give no right to more freight than the Owner had a right to demand from the Charterer.

3PC 82.
30 L.J. 49
4PC. 200
— 226
34 L.J. 97
44 L.J. 41
6PC 323.
1PD 299
46 L.J.P.J. 479
7PD 140

THIS was an appeal from a judgment of the High Court of Admiralty, pronounced in a cause of bottomry instituted by the Respondents, the holders of a Bottomry Bond, against the *Karnak*, her freight and cargo. The Appellants were the Owners of the cargo.

The *Karnak*, a Vessel of 267 tons register, *George S. Locke*, Master, was, in the year 1866, at *Galveston*, in the *United States of America*, where, on the 21st of November, 1866, she was chartered to Messrs. *Droege & Co.*, of *Galveston*, there to load a complete under-deck cargo of compressed cotton, and carry the same to *Liverpool* for freight, according to the original terms of the charterparty; the freight was payable after unloading and right delivery of cargo at *Liverpool*, with a commission of 5 per cent. on the freight, the Vessel being consigned to the order of the Appellants, Messrs. *Droege & Co.*, of *Manchester*.

After the making of the charterparty, and whilst the Vessel was lying at *Galveston*, and before she departed on her voyage, the Appellants, from time to time, advanced to the Master, on account of the necessary disbursements, certain moneys, amounting in the whole to £632. 14*s.* 2*d.*; and it was agreed between the Charterer and the Master that such advances should be made and taken, *pro tanto*, in part payment of freight, and a receipt to that effect for £596. 12*s.* 6*d.*, part of such advances, was indorsed by the Master on the charterparty as a payment out of the proceeds of the freight, with 10 per cent., and charges for insurance of the above sum.

In pursuance of the charterparty, the *Karnak* took on board 720 bales of cotton (the cargo proceeded against), for which the Master signed Bills of lading; and on the 24th of December, 1866, the Vessel sailed for *Liverpool*.

On the 17th of January, 1867, the *Karnak*, having in the prosecution of her voyage met with bad weather and suffered conside-

rable damage, put into the port of *St. George*, in the Islands of *Bermuda*, in distress, and the Master proceeded, shortly after his arrival, to have the Vessel thoroughly repaired; for which purpose a large portion of her cargo was discharged and warehoused. In order to obtain a sum of £2,690. 6*s.* 1*d.* for the payment of the repairs so executed, as well as of other charges and expenses incurred by him at the port of *St. George*, the Master, after having written to the Agent of the Owners of the Ship, and also to the Agent, as he supposed, of the Owners of the cargo, informing them of the distress he was in, and not receiving any answer within the time an answer might have been returned; advertised for tenders for the advance, and executed a Bottomry Bond to one *Bluck*, of that port, by which he hypothecated the Vessel, her cargo and freight, to secure the repayment of £3,228. 7*s.* 3*d.*, being the above sum of £2,690. 6*s.* 1*d.* with maritime interest. The *Karnak* subsequently proceeded on and completed her voyage to *Liverpool*. The Bottomry Bond, of which the Respondents became the legal holders, was never paid. The Respondents consequently instituted the present suit against the *Karnak*, her cargo and freight; and the Owners of the Vessel having allowed judgment to go by default, the Vessel was sold by Order of the Court of Admiralty. The proceeds of such sale were paid into Court, and the Court pronounced for the force and validity of the Bottomry Bond, so far as regarded the Vessel and her freight. The nett proceeds of the sale of the *Karnak*, available for payment of the Bond, amounted to £512. 11*s.* 9*d.* The whole of the freight originally payable under the charterparty in respect of the cargo proceeded against amounted to £1,324. 16*s.* The Appellants, the Owners of the cargo, however, did not pay the whole of that sum into Court, but only the sum of £628. 15*s.* 3*d.*, contending that they had satisfied the residue by advances on account of freight made by the Charterer at *Galveston*, together with costs of insurance, interest, and commission.

At the hearing in the Court below, the Appellants contended—first, that the Bottomry Bond was invalid as against the cargo; secondly, that they were entitled to deduct the part payment of freight. The Judge of the Court below (The Right Hon. Sir *Robert Phillimore*), delivered judgment (1), and thereby pronounced for

(1) Law Rep. 2 A. & E. 298, 313.

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the validity of the Bond, so far as it affected the Ship, cargo and freight, and further directed the Appellants to pay into Court the sum of £727. 19*s.* 3*d.* which they had retained out of the freight as above-mentioned.

From this judgment the Appellants brought this appeal.

Sir *George Honyman*, Q.C., and Mr. *Cohen*, for the Appellants :—

The Bond in this case was not valid against the cargo. A Bottomry Bond may be good in part, though void for the residue: *The Prince George* (1). It is clear from the evidence, and is admitted in the judgment of the learned Judge below, that the money for which the Ship, cargo, and freight were hypothecated was not borrowed until all the necessaries, charges, and expenses, had been supplied and incurred. In such circumstances, the Master had no authority to borrow money on the credit of the Owner of the Ship or cargo: *Beldon* v. *Campbell* (2). The decision in *The Hebe* (3), that a Bottomry Bond for the purpose of obtaining money for the payment of debts for necessaries previously incurred on personal credit may be legally given to a person who has not supplied such necessaries, though relied on by the learned Judge of the Admiralty, cannot be called in aid in this case; it would involve the consequence, that not only has the Master a right to hypothecate the Ship for such debts, but, *ex concessu*, the cargo also, which is beyond the decision; none of the cases cited in that case, and referred to by the Court below, warrant such a conclusion, neither *The North Star* (4), nor *The Hersey* (5), support it to the extent contended for. But, independent of the objection to including the cargo in the Bond, the Bond itself is invalid for the want of that urgent and immediate necessity requisite to justify the borrowing money on bottomry: *The Nelson* (6); *The Boddington's* (7). It appears from the evidence, that the Master might reasonably have waited for an answer from the Owners and the Consignees of the cargo to the communication made by him that he was in want of funds, and would be obliged

(1) 4 Moore's P. C. Cases, 21.
(2) 6 Ex. 886.
(3) 2 Wm. Rob. 412; S. C. 4 Notes of Cases, 361.
(4) Lush. 50.
(5) 3 Moore's P. C. Cases, 79; S. C. 3 Hagg. Adm. 404.
(6) 1 Hagg. Adm. 169.
(7) 2 Hagg. Adm. 425.

to hypothecate the Ship, cargo, and freight, unless they supplied him with money; such communication was essential to justify the Bond: *The Bonaparte* (1); *The Cargo ex The Hamburg* (2); *The Oriental* (3); and from the admissions in the evidence it is clear, that an answer to any communication made by the Master from *Bermuda* to the Owners in *England* might have been obtained in two months: *The Aurora* (4). No damage would have been occasioned to the cargo by such a reasonable delay: *The Lizzie* (5). The repairs alleged to have been necessary were prematurely commenced, and much more extensive than were requisite; they were neither so urgent or necessary as to warrant the hypothecation of the Vessel, much less that of the cargo, which the Bond did not benefit. Such a Bond is not good for repairs done prior to its execution, except on a specific agreement: *The Laurel* (6); *The Hersey* (7); *The Trident* (8).

Secondly, as regards the deductions made for the advance of freight, and which have been disallowed by the Court below. The total amount of freight was £1,356. 14*s.* 6*d.*, as Consignees of the cargo we claimed to deduct £633. 14*s.* 2*d.* in respect of advance of freight made by the Charterer to the Master of the *Karnak* at *Galveston;* £61. 6*s.* 9*d.* for interest and insurance on such advance, and £33. 8*s.* 4*d.* in respect of commission on the charterparty of the Vessel, making in the whole the sum of £727. 19*s.* 3*d.* It was argued by the Respondents in the Court below, that as there was no provision in the charterparty which authorized the Master to receive payment of his freight in advance, no advance could be made on freight, but only as a personal loan, and they relied on the judgment of Dr. *Lushington* in *The Salacia* (9), and *Manfield* v. *Maitland* (10); and contended, that as freight so in advance was not an insurable interest, it could not be deducted. But the whole question really turns upon the contract between the parties, and it is clear from the receipts indorsed on the charterparty that the contract between the Master and the Appellants was for payment of

(1) 8 Moore's P. C. Cases, 459.
(2) 2 Moore's P. C. Cases (N.S.) 289.
(3) 7 Moore's P. C. Cases, 398.
(4) 1 Wheaton, Amer. Rep. 104.
(5) Law Rep. 2 A. & E. 254.
(6) B. & Lush. 191.
(7) 3 Moore's P. C. Cases, 79.
(8) 1 W. Rob. 29.
(9) Lush. 581.
(10) 4 B. & Ald. 582.

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the freight at *Liverpool*, the port of delivery, and was not, therefore, a personal loan: *Hicks* v. *Shield* (1) is an authority for shewing that the question, whether the advance be a mere loan or an advance of freight must principally depend upon what appears upon the face of the instrument; as here, on the charterparty and its indorsement. It is clear, that the agreement between the Master and the Charterers was, that the money advanced should be taken in part payment of freight, and that it was so taken. Freight paid in advance cannot be recovered back, though the Ship be afterwards lost on the voyage: *Maclachlan* on Merchant Shipping, p. 442, who cites *Hicks* v. *Shield*.

Sir *John B. Karslake*, Q.C., and Mr. *Clarkson*, for the Respondents:—

The Bond in this case was rightly determined by the learned Judge of the Admiralty to be a valid instrument. It is not disputed but that the *Karnak* required extensive repairs: and the Master, being without funds or credit, had no means of obtaining money to enable him to prosecute his voyage without resorting to a loan on bottomry of the Ship, her cargo, and freight. The repairs were urgent, the Ship at *Bermuda*, the Owners of the Vessel in *New York*, and the Agent of the Owners of the cargo in *England*. That is sufficient answer to all the objections made to the want of authority of the Master to hypothecate the Ship and cargo. We do not dispute the essential requisite to the Bond, namely, its necessity, or any of the cases cited in support of such a proposition by the Appellants. But it is said, that the Bond is bad because taken for charges and expenses incurred previous to its date; in other words, for the purpose of paying persons other than the Bondholders the amount of advances made by them at the port of distress, notwithstanding that such payments were for the necessities of the Ship, and to enable her to prosecute her voyage. The repairs were as necessary for the cargo as for the Vessel: *The Hebe* (2). The parties who made the repairs might have arrested the Ship, as by the Law of *Bermuda* those who supply the necessaries to a Ship have a lien on the Ship, and can, therefore, arrest her. That state of the law is in evidence, and at once disposes of

(1) 7 E. & B. 633. (2) 2 W. Rob. 412; S. C. 4 Notes of Cases, 361.

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the objection to the Bond being for expenses incurred previous to the date of its execution: *The Vibilia* (1); *The Alexander* (2); *The Prince George* (3); *The Osmanli* (4); *The Gratitudina* (5). With respect to the sum of £727. 10*s.* 3*d.* deducted for the advance of freight, the Master had no authority to receive any part of the freight in advance. The charterparty contains no provision under the authority of which the Appellants can justify their claim to such deductions: *Maclachlan* on Merchant Shipping, p. 442. The advances made by Messrs. *Droege & Co.*, of *Galveston*, to the Master of the *Karnak* were intended to be, and were, in fact, advances by way of loan on the security of the freight, and not a part payment of the freight. The distinction between a loan and advance of freight is laid down in *The Salacia* (6). The advance made by *Bluck*, for which the Bond was given, was without notice or knowledge of the dealing which had taken place between the Master and Messrs. *Droege & Co.*, of *Galveston*. The decree of the Court below is in conformity with facts proved in the case, and the law applicable thereto.

1869
July 15.

SIR WILLIAM ERLE:—

Upon this appeal two questions have been raised; the first relating to the cargo, the second to a part of the freight.

As to the cargo, the question is, whether the circumstances in which the Ship is shewn to have been placed created a necessity for hypothecation? In the Court below the answer was in the affirmative; and, in his judgment there, the learned Judge carefully examined the evidence and all the authorities in the Admiralty Courts relevant to the case, and their Lordships now agree in the conclusion which was there arrived at in respect of the cargo, and consider that any detailed examination of the arguments adduced here on behalf of the Appellants is rendered unnecessary thereby; but they add a reference to some Common Law cases containing principles confirmatory of the decision in the Court below.

In *Lloyd* v. *Guibert* (7), the extent of the authority conferred on the Captain by his appointment to bind the interest of the Owner

(1) 1 W. Rob. 1.
(2) 1 Dod. 278.
(3) 4 Moore's P. C. Cases, 21.
(4) 3 W. Rob. 198.
(5) 3 Rob. 240; and see Tudor's L. C. p. 76.
(6) Lush. 582.
(7) 6 B. & S. 100.

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either of the Ship or of the cargo, and the principles on which the limits of that authority are to be ascertained, are laid down by *Blackburn*, J., in the Queen's Bench, and by *Willes*, J., in the Exchequer Chamber. There the Captain of a French Ship had hypothecated the Ship, freight, and cargo, and the Owner of the cargo sued the Shipowner to indemnify him for the loss occasioned thereby; and it was decided that he could not recover, because by the Law of *France* the Captain cannot make the Shipowner liable for more than the value of the Ship and freight, and as the Owner had abandoned both, he was exempt from further liability. It was there laid down, that the Captain's authority is derived from, and bounded by, the Municipal law of the Country to which the Ship belongs,—that is, by the law of the Flag; and *Willes*, J., delivering the judgment of the Exchequer Chamber, answers an argument, founded on the supposition of a general Maritime law, contra-distinguished from the Municipal law of this country, by refusing to recognise the existence of a Maritime law in that sense.(2)

In accordance with the principle thereby laid down, their Lordships consider, that the existence of the necessity which validates the hypothecation of cargo by bottomry is to be ascertained by evidence in the usual manner; and that the meaning of the term "necessity," in respect of hypothecation by the Master, is analogous to its meaning in other parts of the law. This meaning has been the subject of much discussion in *Westminster Hall:* see *Reg.* v. *Winsor* (1); it has been described as a high degree of need—a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made.

In the case of a voyage it is probably correct to say, that any alternative for the Captain is better than total loss of the Ship and cargo, and that he is under a necessity of choosing another alternative, if any should be possible; and in respect of bottomry, any combination of events which would prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question, whether there was need for bottomry in such high degree as to create a necessity. These remarks are made in answer to some arguments offered to us founded upon cases sup-

(1) Law Rep. 1 Q. B. 394.

(2) Law Rep. 1 Q.B. 115

posed to decide that a Bottomry Bond would in all cases be void on account of the absence of necessity if the repairs were completed before the Bond to raise money to pay for them was given or contracted for, or if there was no communication with the Owner of Ship or cargo before the Bottomry Bond was given. The effect of any such fact cannot be appreciated without taking it in combination with the concomitant facts. If the repairs were complete, but the Ship could not leave the port until they were paid for, the completion of repairs would be an immaterial fact in estimating the degree of need for bottomry. If the Creditor could sell the Ship in case of non-payment, the sale would be a total loss of the voyage for the Ship, and the learned Counsel for the Appellants failed to shew either any duty on the Captain, in case of such sale, to land, warehouse, and tranship the cargo, or any possibility thereby to realize any profit for the freighter. So in respect of communication with the Owner either of Ship or cargo, the possibility of so doing must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure after every exertion should have been made.

The effect of any single fact upon the prospect of prosecuting the voyage with profit varies in endless permutation, according as some other fact forms a part of the combination of events which the Captain has to consider in deciding whether there is a necessity for bottomry; and, as we before observed, we concur with the learned Judge in the Court below in thinking, that such necessity was shewn to exist in this case, although the repairs were completed before any proposal for the Bond was made by the Captain, and although the attempts to communicate with the Owner of Ship or cargo were not carried further than appeared by the evidence.

Then as to the second ground of appeal, relating to the sums borrowed by the Captain from the Charterer at the port of loading, viz., £632. 14*s.* 2*d.* cash advanced, and £61. 6*s.* 9*d.* interest and insurance thereon, the question between these parties is, whether the sums were to be repaid in any event, or only by deduction from the freight if freight was earned. The Charterer, on signing the charterparty, incurs a liability for the chartered freight which becomes a debt in case of safe delivery of cargo, and the

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Captain, for the Shipowners, frequently obtains advances as well on account of this liability, whether stipulated for in the charterparty or not, as on the personal security of his Owners: in either case they are loans; in the one case they are advances of freight, in the other case they are debts from the borrower. The distinction is at times material, because if they are advances of freight the lender has an insurable interest in an advance which is to be lost if freight is not earned, but he has no such interest in an absolute debt.

In the present case, advances are not stipulated for in the charterparty, but were obtained by the application of the Captain to the Charterer, and both he and the Charterer state, that they were advances of freight, and the receipts for the advances are so expressed as that, if effect is given to those parts of them relating to insurance, they are decisive to shew that the sums obtained were advances of freight, to be repaid by deductions from freight, if earned; and if not earned, then to be lost by the Charterer, unless he should have used the stipulated premium in insuring. We consider *Hicks* v. *Shield* (1) to be an authority for this construction. On these grounds, as between the Charterer and the Shipowner, their Lordships come to the conclusion, that the sums obtained, viz., £632. 14*s.* 2*d.* cash advanced, and £61. 6*s.* 9*d.* for interest and insurance thereon; together, £694. 0*s.* 11*d.*, were advances of freight.

Then as between the holder of the Bottomry Bond and the Charterer, is the nature of the transaction changed?

Does the Captain, by hypothecating the chartered freight to the Obligee in bottomry, give a right to more freight than he, as Obligor, had a right to demand from the Charterer?

The learned Counsel for the Respondents adduced no authority in support of the proposition that the Assignee took by assignment what the Assignor had no title to. The case of the last Bottomry Bond taking precedence of prior Bottomry Bonds, stands on the known incidents to a loan on bottomry; and no such incident has been shewn to be attached by known course of law to advances on account of chartered freight. But, on the contrary, in *Parson's* Maritime Law, vol. i., p. 429, it is stated, that a general hypothecation of freight includes freight whether earned or not, "provided

(1) 7 E. & B. 633.

it has not been paid to the Master or Owner." He refers to *The John* (1), where the advance was stipulated for by the charterparty, but we consider that the same principle applies to any *bonâ fide* arrangement without fraud for forehand-payment or discharge before the Bottomry is required.

The learned Counsel also used as an argument the policy of the law in making bottomry a good security, but it must not be made a good security by violating the rights of others. It is a good security in this case, as the cargo must pay if the prepaid freight is exempt. The lender on bottomry had the opportunity for knowing what advances had been made on account of freight, as they were indorsed on the charterparty, which he might have seen, and there was no ground for imputing fraud.

For these reasons, their Lordships will recommend that the judgment in the Court below should be reversed, in so far as it relates to the sums claimed as advances of freight, and for interest and insurance thereon.

There remains the sum of £33. 18*s.* 4*d.*, claimed as commission due by usage for obtaining the charter; and, according to such usage, to be paid by deduction from freight, if earned. But as to this sum, the statements in the evidence do not convince their Lordships that the Appellants had the right to deduct it from the freight as against the holder of the Bottomry Bond; and they do not further examine into the right to this sum because as between these parties no interest depends upon the right thereto.

Their Lordships will, therefore, recommend to Her Majesty to affirm so much of the judgment of the Court below, as affirms the liability of the Appellants as owners of the cargo to the holder of the Bottomry Bond, and denies the right of the Appellants to deduct the sum of £33. 18*s.* 4*d.* from the freight for commission; and to reverse so much of the judgment as relates to the refusal to allow, as deductions from the freight to be paid to the Respondents, the above-mentioned sums which their Lordships consider to have been advances of freight. There will be no costs of appeal on either side.

Solicitors for the Appellants: *Field, Roscoe, Field, & Francis.*
Solicitors for the Respondents: *Waltons & Bubb.*

(1) 3 W. Rob. 170.

J. C.* 1869 June 15.

THOMAS STEPHENS . . . . . APPELLANT;

AND

JOHN BROOMFIELD AND ANOTHER . . . RESPONDENTS.

THE "GREAT PACIFIC."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Bottomry Bond—Construction of, as to loss, and to recovery of part—Ship abandoned and sold—General Average—Salvage.

The Master of a Ship, to raise money for necessary repairs, hypothecated the Ship and freight. The Bottomry Bond contained a clause which provided, that the obligation should be void if the Obligors should pay, in consequence of the loss of the Ship, such an average as by custom would have become due on the salvage, or if the Ship should be utterly lost, cast away, or destroyed, in consequence of the perils of the sea. The Ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port in a damaged state, and after being surveyed was found unseaworthy, and sold while existing in specie for a sum less than the amount of the Bond:—

Held, by the Judicial Committee (affirming the judgment of the Admiralty Court):—

First, that the doctrine of constructive total loss does not apply to Bottomry Bonds, as in the case of Insurance between Insurers and Insured, and the Bondholder's claim to the entire proceeds of the sale upheld.

Secondly, that the above clause in the Bond did not apply when the Ship remained in specie, though so much damaged that it would have cost more to repair her than she was worth.

THIS was a cause of Bottomry promoted by the Respondents, the holders of a Bottomry Bond on the Ship *Great Pacific*, against the proceeds of the sale of the Vessel in the hands or control of the Master, who was dismissed from the suit, by consent, on such proceeds being brought into Court. The Appellant, who was a Mortgagee of the Ship, intervened in the cause, for the purpose of defending his interest in the proceeds against the claim of the Bondholders, and was made a Defendant in the Court below.

The facts which gave rise to the appeal were as follows:—

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, and SIR JOSEPH NAPIER, BART.

In the month of November, 1865, the *Great Pacific* was chartered by her then Owner to the *Guano Consignment Company*, of *Great Britain*, to sail, after discharge of her outward cargo at *Brisbane*, direct to *Callao* and the *Chinchas*, and there load a cargo of Guano for *Great Britain*. The Ship discharged her outward cargo at *Brisbane*, and, whilst proceeding to *Callao*, put into the port of *Sydney* for repairs, and the Master (*Baillie*) then took up money for such repairs from the Respondents upon Bottomry, and on the 29th of March, 1867, the Master of the Ship executed the Bottomry Bond in question, whereby he hypothecated the Ship, her tackle, apparel, and furniture, and the freight earned or to be earned on the voyage, unto the Respondents as security for the sum of £5,037. 13*s.* 5*d.*, and the agreed premium or maritime interest thereon at the rate of £45 per cent. for the voyage, amounting together to the sum of £7,304. 15*s.* 9*d.* The condition of the Bond provided, that if the Ship should complete her voyage, and if the Master (*Baillie*), or the Owners of the Ship, should pay to the Respondents the sum of £5,037. 13*s.* 5*d.*, together with a premium or maritime interest thereon, within twelve hours after the Ship's arrival at her port of discharge in the *United Kingdom*, or at *Cork*, or in case of the loss of the Ship, such an average as by custom should have become due on the salvage, or if on the voyage the Ship should be utterly lost, cast away, or destroyed, in consequence of fire, enemies, men of war, Pirates, storm, or other unavoidable perils, damages, or casualties of the seas, rivers, and navigation, then the Bond should be void and of none effect.

The *Great Pacific* proceeded on her voyage to the *Chinchas*, and there loaded the Guano and sailed for the *United Kingdom;* but, in consequence of a severe hurricane, and the damage she sustained, she was compelled to put into *Valparaiso*. She was then surveyed, and found to be so damaged as not to be worth repairing, in consequence of which the further prosecution of the voyage was abandoned, and the Ship sold for £3,628. 8*s.*, never having arrived at the port of her discharge.

A petition was presented by the Respondents, the legal holders of the Bond, against the Master, and the proceeds of the Ship, setting forth, in substance, the above facts, alleging that no portion of the money advanced by them as aforesaid, or of the premium

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or maritime interest thereon, had been repaid to them, nor that they received any sums under the Bond, and prayed that the Court would pronounce for the validity of the Bond, and refer it to the Registrar and Merchants to ascertain and report what was due to them in respect of the premises. The Appellant, the Mortgagee of the Ship, intervened, and by his answer set out the Bond, and alleged that the Ship upon such sale realized the sum of £3,628. 8*s*., and that the freight included in the Bond never became due, but was wholly lost; that, under the circumstances, the Bond had never become payable, and that the Respondents were not entitled to the proceeds of sale, nor to any part thereof, that a portion only, and not the whole, of the sum of £5,037. 13*s*. 5*d*., for which the Bond was given, was properly advanced on Bottomry of the Ship and her freight, and insisted that, under the circumstances, the Bond never became payable, and that nothing was due thereon; and, even if the Bond had become payable, and anything was due thereon, yet that the Respondents were not entitled to the whole of the sum of £3,628. 8*s*., but to such an average only as by custom had become due on the above sum, and to no more.

The Respondents, upon this answer being filed, gave notice of their intention to move the Court to reject so much of the answer as set up, first, that nothing was due on the Bottomry Bond in question; and, secondly, that the Respondents were only entitled to an average on the sum of £3,628. 8*s*., the amount of the proceeds of the sale of the Ship paid into Court.

Upon the hearing of the motion, which being in the nature of a demurrer the statements of facts contained in the answer were taken to be true, the Judge of the Court of Admiralty (The Right Hon. Sir *Robert Phillimore*) on the 17th of November, 1868, delivered judgment, pronouncing for the prayer of the Bondholders, and directing the articles in question to be struck out of the answer (1).

From the Decree or Order made thereon the present appeal was brought.

Sir *G. Honyman*, Q.C., and Mr. *Clarkson*, for the Appellant:—

According to the true construction of the Bond, the same is to

(1) Law Rep. 2 A. & E. 381.

be void if the Ship is utterly lost by reason of sea perils. If the Ship was utterly lost, the holder of the Bond gets nothing, if partially lost, then an average. The object of the clause avoiding the Bond was to distinguish between a constructive and total loss, and to especially provide, that in the event of the former, a portion of the sum secured would still be payable. [SIR JOSEPH NAPIER:—In *Thomson* v. *The Royal Exchange Assurance Company* (1) Lord *Ellenborough* says, that in the case of Bottomry nothing short of a total destruction of the Ship will constitute an utter loss; if it exists in specie, in the hands of the Owner, it will prevent an utter loss.] It does not appear from the report in that case what the Bond was, but from what fell from the Court, it would appear that there was no clause like this. Neither in *The Catherine* (2), *The Dante* (3), nor *The Elephanta* (4), is the form of the Bond given. The Ship was brought into port so damaged that it was impossible to repair her, except at a greater expense than she was worth, and the case comes, therefore, within the rule laid down in the cases of *Moss* v. *Smith* (5), *Rosetto* v. *Gurney* (6), and *Adams* v. *Mackenzie* (7), upon the doctrine of total loss of the Ship; which is, that whenever a Ship is brought into such a state as to be unserviceable, she must be said to be lost: *Parson's* Maritime Law, vol. i. p. 409. But even if the Bond had become payable, the Respondents were not entitled to the whole proceeds of the sale of the Ship, but only to a customary average, as, by the express terms of the Bond, in the event of the loss of the Ship the Bond was to be void on payment of the customary average on the salvage, and, therefore, the Respondents cannot claim more than such customary average: *Boulay-Paty, Cours de Droit Commercial Maritime, Tom.* III. p. 183. The proceeds of the sale are clearly salvage, and the case falls precisely within the stipulations of the parties contained in the Bond.

Mr. *Cohen* (with him Mr. *Butt*, Q.C.), for the Respondents:—

No doubt as between assurers and the assured the condition of the Ship constituted a total loss; but that doctrine of constructive

(1) 1 M. & S. 31.
(2) 15 Jur. 231.
(3) 2 W. Rob. 427.
(4) 15 Jur. 1185.
(5) 9 C. B. 94.
(6) 11 C. B. 176.
(7) 13 C. B. (N.S.) 442.

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total loss is peculiar to Insurance law, and *Barr* v. *Gibson* (1) does not apply to cases of Bottomry: *Thomson* v. *The Royal Exchange Assurance Company* (2). Therefore, *Moss* v. *Smith* (3), and the class of cases founded upon that decision, have really no bearing at all on the question, and to apply the doctrine to Bottomry upon those cases would vary the rights themselves: *Thomson* v. *The Royal Exchange Assurance Company* (2), *The Dante* (4), *The Catherine* (5), and *The Elephanta* (6), proceed upon general principles of Maritime law as applied to Bottomry, and they establish, as a general rule, that there is no loss of a Ship so long as the Ship exists in specie, as the Court below has held in this case. *Kent*, Commentaries, vol. iii., § 359, lays it down, that there can be no constructive total loss: *Phillips*, on Insurance, sec. 1487 [5th Ed.]; *Boulay-Paty, Droit. Com., Tom.* III., pp. 179, 180; 1 *Parson's* Maritime Law, p. 409. In *Abbott* on Shipping, p. 131 [11th Ed.], the requisites to the validity of Bottomry securities are considered, and the principles there laid down. So in *Pope* v. *Nickerson* (7). The condition in this Bond is in the ordinary form given in *Abbott* on Shipping, App. p. 289 [10th Ed.]; *Westkitt*, Dig. of the Law of Insurance, pp. 41, 48, 58; and probably was contained in the Bonds to which the above cases refer. The rule is, that if the Ship is lost, the lender on Bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security.

1869 *July* 5.

Their Lordships' judgment was reserved, and now pronounced by

SIR JAMES W. COLVILE:—

There is no contest concerning the facts out of which this appeal has arisen. The *Great Pacific* having taken an outward cargo from *Liverpool* to *Brisbane*, was, after its discharge, chartered from the latter port by the *Guano Consignment Company* of *Great Britain* to sail to *Callao*, and thence to the *Chinchas*, where she was to load a cargo of Guano, and return therewith *viâ Callao* to such port or place within the *United Kingdom* as the charterers

(1) 3 M. & W. 390.
(2) 1 M. & S. 31.
(3) 9 C. B. 94.
(4) 2 W. Rob. 427.
(5) 15 Jur. 231.
(6) Ibid. 1185.
(7) 3 Story's Amr. Rep. 465.

might select. Between *Brisbane* and *Callao* she was compelled to put into *Sydney* for repairs; and to defray the cost of these repairs the Master raised the sum of £5,037. 13*s.* 5*d.* on bottomry; and on the 29th of March, 1867, executed a Bottomry Bond, hypothecating the Ship and freight for that sum with maritime interest at 45 per cent.

The Vessel then proceeded on her voyage, reached the *Chinchas*, took in her cargo there; but on her homeward voyage was obliged to put into *Valparaiso* in a damaged state, and was then sold for £3,628. 8*s.*, under circumstances which, it is admitted, would, as between assurers and assured, constitute a constructive total loss.

The money was paid into the Admiralty Court, and the holders of the Bottomry Bond (the Respondents on this appeal), brought their suit to enforce their claim against it. The suit was defended only by the Appellant, who, claiming to be a mortgagee of the Vessel, intervened to protect his interest: and the sole question between the parties is, whether the Respondents as Bondholders are entitled to the whole, or to any, and what part of the sum of £3,628. 8*s.*

The Appellant, in his answer, set forth the Bond, with its condition, which, amongst other things, provided that the obligation should be void if the Obligors should pay, "in case of loss of the Ship or Vessel, such an average as by custom should have become due on the salvage; or if, on the said voyage, the said Ship or Vessel should be utterly lost, cast away, and destroyed," in consequence of the perils of the sea. And the Appellant insisted, that under these provisions, and upon the facts above stated, the Bond had never become payable, and that nothing was due thereon; or that if it had become payable, the Respondents were not entitled to the whole of the sum of £3,628. 8*s.*, but only to such an average as by custom should have become due thereon, and to no more.

To these defences the Respondents took a proceeding in the nature of a demurrer by moving that so much of the answer as set them up should be rejected. The learned Judge of the Admiralty Court granted that application, and this appeal is brought against his decision.

It is obvious that, if either defence is to prevail, the constructive total loss involved in the sale of the Vessel at *Valparaiso* must be treated as a "loss" within the meaning of that stipulation in the condition of the Bond upon which the defence is founded. It was

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admitted at the Bar, and could not have been disputed with effect, that the Vessel cannot be said, by reason of what occurred at *Valparaiso*, to have been utterly lost, cast away, or destroyed; and consequently that the appeal cannot be supported in so far as it impugns so much of the learned Judge's Order as rejected the averment that nothing was due upon the Bond. Therefore, the only question now to be decided is whether, on the true construction of the words "in case of loss of the Ship or Vessel such an average as by custom shall have become due on the salvage," and upon the admitted facts of the case, the Respondents are entitled, not to the whole, but only to some undefined portion of the sum in Court.

The general law is succinctly stated in *Kent's* Commentaries, vol. iii., § 359, p. 454 [11th Ed.] Speaking of a loan on bottomry he says: "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." In support of this he cites *Thomson* v. *The Royal Exchange Assurance Company* (1). And the doctrine is supported by the modern Admiralty cases of *The Catherine* (2), and *The Elephanta* (3); *The Dante* (4); the American case, before Mr. Justice *Story*, *The Draco* (5), and by other authorities. The first proposition is, moreover, admitted in this case by that abandonment of the principal ground of appeal which has already been mentioned.

The learned Counsel for the Appellant have, however, argued, on the authority of a passage in *Valin*, which is cited at page 183 of the 3rd volume of *Boulay-Paty's Cours de Droit Commercial Maritime*, that when the Vessel is lost, the lender on bottomry is entitled only to such a proportion of the value of the property salved as the sum lent bore to the value of the whole property hypothecated. *Valin*, it is to be remarked, is speaking of the hypothecation of a cargo; and it is not clear that his doctrine, if true, would apply to the proceeds arising from the sale of a Ship or the *débris* of a Ship. *Boulay-Paty*, however, goes on to shew that this opinion of *Valin* was contested by both *Pothier* and

(1) 1 M. & S. 30.
(2) 15 Jur. 231.
(3) 15 Jur. 1185.
(4) 2 Wm. Rob. 427.
(5) 2 Sumner's Amr. Rep. 157.

Emerigon; that it was not received in *France* under the old Law, and is certainly not recognised by the Codes as part of the Maritime Law. The general rule undoubtedly is, that if the Vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the Bondholders in this case are, as between themselves and the Shipowners, or a Mortgagee of the Ship (whose rights are as much bound in bottomry as those of the Owner of a Ship not mortgaged) entitled to the whole of the proceeds of the sale of the Vessel, then existing as a Vessel in specie, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in their Lordships' opinion, does not admit of reasonable doubt.

It has, however, been argued that such a provision is to be found in the words now to be considered. It is contended that the "loss" of the Vessel there spoken of, when contrasted with the words in the following sentence, which import its utter loss and destruction, must be taken to mean something short of such utter loss, and to include a constructive total loss; that the proceeds of the sale may be properly described as salvage: and consequently that the effect of this clause is to make those proceeds divisible between the Bondholders and the Shipowners in proportions to be ascertained according to some custom of the existence and nature whereof nothing in the shape of proof has been suggested. It does not, however, follow that because the words, "the loss of the Vessel," mean something short of utter loss and destruction, they, therefore, include "a constructive total loss," which, as has already been shewn, they would not include upon the construction of ordinary Bottomry Bonds. It is obvious that a Vessel may be so wrecked as to be no longer a Vessel in specie, and so as to become a mere congeries of planks, and yet that there may be salvage of its materials to a considerable amount. In the case of *The Catherine* (1), Dr. *Lushington* says, "If a Ship was once bottomried, the Bond attached to the very last plank, and the holder might have that sold for his benefit." The clause under consideration may have been intended to secure that right by making it a condition

(1) 15 Jur. 232.

J. C. 1869 STEPHENS v. BROOMFIELD. THE "GREAT PACIFIC."

for the avoidance of the Bond that the Obligors should account for such salvage. Again, it seems to be a forced and unnecessary construction of the clause to hold that it necessarily implies any division or apportionment between the Bondholders and Shipowners. That the former, who were entitled to the security of the whole Ship when in a seaworthy condition, should contract that in the event of the deterioration of their security, by a constructive total loss or otherwise, they should share the proceeds with their Debtors, is so improbable an hypothesis that the construction is only to be admitted if there is no escape from it. The clause, as Mr. *Cohen* shewed, is not a special one, it is to be found in the form of a Bottomry Bond given in the Appendix to *Abbott* on Shipping. Whatever it means, their Lordships believe that it was intended to secure the payment to the Bondholders of something which the Obligors might become entitled to receive from third parties in respect of the Ship, and not a division of the proceeds of the sale of the Vessel between the Bondholders and the Shipowners. It would meet the case suggested at the Bar, in which the Vessel having been voluntarily stranded with a view to the preservation of the cargo, general average upon the cargo salved might become due from the Owners of that cargo to the Owners of the Ship. That such average would become due if the Ship, failing to get off, is totally lost, seems to be a question upon which Jurists are not agreed, see *Abbott* on Shipping [10th Ed.], pp. 373-375, and 2 *Phillips* on Insurance, § 1315; but the clause may, nevertheless, have been designed to cover such average, if the right to it existed.

Their Lordships, however, think that they are not called upon to determine upon what particular subject the clause might operate, because it can have no operation in the present case unless there has been a *loss* of the Vessel within the meaning of it.

For the reasons above given, they are of opinion that there has been no such loss; and, being of that opinion, they will humbly advise Her Majesty to affirm the Order of the Admiralty Court, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Cotterill & Sons.*
Solicitors for the Respondents: *Westall & Roberts.*

THE OWNERS OF THE STEAMSHIP "LION" APPELLANTS;
AND
THE OWNERS OF THE SHIP OR VESSEL "YORKTOWN" . . . . . } RESPONDENTS.

J. C.*
1869
June 16.

THE "LION."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Compulsory Pilotage—General Pilot Act—Merchant Shipping Act—Passengers—Collision—Owner's liability.

It is not compulsory on a passenger Ship to take a licensed Pilot on board when she is not carrying Passengers: and the Owners are responsible for the negligence of the Pilot, where they were not compellable to put him in charge of their Vessel.

The payment of a fare is necessary to constitute a Passenger within the meaning of the compulsory pilotage sections of the *Merchant Shipping Act* (17 & 18 Vict. c. 104).

Where, therefore, the Wife and Father-in-Law of the Captain were on board a Vessel (usually carrying Passengers, but not on a passage voyage at the time), by invitation from the Captain, without the privity of the Owners, who had neither paid, nor agreed to pay, any fare, before a collision took place; such persons were *held* not to be "Passengers" within the meaning of the Act, so as to exonerate the Owners from the damage occasioned by the Pilot's default.

Distinction between sect. 55 of the *General Pilot Act* (6 Geo. 4, c. 125), and the *Merchant Shipping Act* (17 & 18 Vict. c. 104), s. 388, as to the immunity of the Owners when the Vessel is in charge of a licensed Pilot.

The case of *The Stettin* (1) followed.

THIS was a cause of damage arising out of a collision which occurred in the river *Thames* on the 8th of December, 1867, between the English Screw Steamer *Lion*, and the American Ship *Yorktown*. The Owners of the *Yorktown* were the Plaintiffs, and the Owners of the *Lion* the Defendants.

The Defendants pleaded, amongst other things, that their Vessel was in charge of one *West*, a duly licensed Pilot for home trade passenger Ships, that she had on board two Passengers, and that

(1) Br. & Lush. 199.

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE and SIR JOSEPH NAPIER, BART.

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the employment of such licensed Pilot was at the time and place of the collision compulsory by law upon the *Lion*, her Master and Owners, and that the *Lion* was at such time under the sole charge of the Pilot, whose orders in reference to her navigation were promptly and implicitly obeyed; and the collision, if it was occasioned by the *Lion* or any one on board her, was exclusively occasioned by the Pilot, and, therefore, neither the *Lion* nor her Owners were liable in respect thereof.

It was admitted at the hearing in the Court below, that the collision was caused by the improper navigation of the *Lion*, but her Owners contended, that they were exonerated from liability because the Pilot was employed by them by compulsion of law, and the evidence shewed that he was alone to blame in the matter.

The Respondents contended, first, that the evidence failed to shew, that the *Lion* was actually in charge of a duly licensed Pilot for home trade passenger Ships, acting at the time as such Pilot, and that he alone was to blame for the collision; second, that the Defendants had failed to prove that the *Lion* was carrying Passengers as alleged in the answer; and, third, that the evidence adduced failed to establish that the employment of the Pilot was at the time and under the circumstances in question compulsory on the Defendants.

The Judge of the Admiralty Court (The Right Hon. Sir *Robert Phillimore*) gave judgment for the Plaintiffs, and pronounced for the damages proceeded for (1).

The appeal was from this interlocutory decree.

Mr. *Milward*, Q.C., and Mr. *Clarkson*, for the Appellants :—

Admitting that the collision was occasioned by the *Lion*, we contend, that the Appellants, the Owners, were exonerated from liability, by reason of their having a licensed Pilot on board, whom they were compelled to employ: *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company* (2). The 378th section of the *Merchant Shipping Act* (17 & 18 Vict. c. 104), is imperative; even if the Pilot had been voluntarily taken on board, being within the waters for which he was

(1) Law Rep. 2 A. & E. 102.

(2) Law Rep. 3 Ex. 330; S. C. in Ex. Ch. Law Rep. 4 Ex. 238.

licensed, the Owners would have been exempted for the damage occasioned by the Pilot's default: *The Fama* (1); *Lucey* v. *Ingram* (2). The exemption provided by sect. 379 of the *Merchant Shipping Act* does not apply; the *Lion* was carrying Passengers. Sect. 303 defines "Passengers" "to include any persons carried in a Steam-ship other than the Master and crew, and the Owner, his family and servants"; here the Passengers were the Wife and Father-in-Law of the Captain, and could not, therefore, come within the exemption claimed. The learned Judge of the Admiralty Court refers for the definition of a "Passenger" to the *Passengers Amendment Act*, 18 & 19 Vict. c. 119, and concludes, that a Passenger must be one who pays passage-money. There is no such stipulation to be found in the Statute, though the statutable remedies given to Passengers in general may apply chiefly to those who have paid passage-money. Here, however, we contend, that there was sufficient evidence of the intention that passage-money should be paid to constitute a contract for the passage, and to make the parties carried in the Vessel, "Passengers" in the ordinary and legal sense of the term. A person may be, for all legal purposes, a Passenger without payment of passage-money: *Jennings* v. *The Great Northern Railway Company* (3).

The *Admiralty Advocate* (Dr. *Deane*, Q.C.), and Mr. *Butt*, Q.C., for the Respondents:—

The decision of the learned Judge of the Admiralty Court was consistent with the law and facts of the case, and cannot be impeached. It is admitted, that the collision was occasioned by the fault or incapacity of the Pilot on board the *Lion*. He was a duly licensed Pilot, and at the time of the collision he was acting in charge of the Vessel. But we submit, that the employment of the Pilot at the time and place of the collision was not compulsory by law, and that, therefore, the Owners of the Vessel were, as decided in the Court below, liable for the damage proceeded for. Now, how is it sought to take the case out of the exemption provided by sect. 379 of the *Merchant Shipping Act?* That section exempts certain Ships from compulsory pilotage when not carrying Passengers. It is not questioned that, if the *Lion* was not carrying

(1) 2 W. Rob. 184. (2) 6 M. & W. 302. (3) Law Rep. 1 Q. B. 7.

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Passengers she was not compellable to take a Pilot on board. Who, then, were the supposed Passengers? the Wife and Father-in-Law of the Captain, who had been invited by him on board, and offered a passage from *London* to *Hull*. There was no contract, no terms implied or suggested, at the time; but after the collision, and when it was found that by making, or calling them, "Passengers," the Owners might escape the consequences of the damage occasioned by the negligent pilotage, then a payment for passage was, for the first time asked, and said to have been agreed on. Such a course of dealing cannot convert parties into Passengers, either within the meaning of the 379th section, or the common sense and law of the term. The *Passengers Amendment Act*, 18 & 19 Vict. c. 119, if it has any bearing, contemplates Passengers as a class, with whom a contract is made, the breach of which is remediable either by the Statute or the Common Law. Where would have been the remedy here? The describing these persons as "Passengers" is merely colourable, and cannot be supported. Then, as regards the application of the *Merchant Shipping Act* of 1854: the *Lion* was not a passenger Steamer at the time of the collision, within the meaning either of the 303rd or the 378th sections of that Act. Her usual course was from *Hull* to *St. Petersburg;* on this occasion only she went from *London* to *Hull*, she had no instructions to take Passengers, and those on board were mere visitors or guests of the Captain. As she was not carrying Passengers, she was expressly exempted from compulsory pilotage by the 379th section: *The Stettin* (1). *The Eden* (2) is directly in point; there the Owners of a damaging vessel were condemned in the damage, the Pilot in charge not being taken by compulsion of law.

1869 *July* 15.

LORD ROMILLY:—

In this case the *Lion*, a screw Steamer, proceeding from *London* to *Hull*, ran into the *Yorktown* in broad daylight, at 11 A.M., on the 8th of December, 1867, at *Blackwall Reach*.

The *Yorktown* was being towed by two Steam-tugs down the river, when the *Lion*, without any excuse of following, ran into her stern and did her considerable damage.

The question is, are the Owners liable for this damage? In

(1) Br. & Lush. 199–203. (2) 2 W. Rob. 442.

order to determine this it is necessary to decide, first, whether the *Lion* was under the charge of a duly licensed Pilot at that time; and secondly, whether it was compulsory on the *Lion* to take a duly licensed Pilot.

If these questions are answered in the affirmative, then the Owners are exonerated. If in the negative, they are liable.

But if the first question be answered in the affirmative, and the second question in the negative, then it becomes necessary to ascertain, whether a decision made as to the meaning and effect of the Statute, 6 Geo. 4, c. 125, s. 55, is applicable to cases which come within the scope of the 388th section of the *Merchant Shipping Act*, 17 & 18 Vict. c. 104.

As to the first question: *West*, the Pilot, had two licenses, one a Waterman's license, which would be of no avail, and the second a regular license from the *Trinity House*, authorizing him to act as Pilot for some home trade passenger Ships within the limits in which the collision occurred; the consequence is, that he was a duly licensed Pilot having charge of the Vessel at that time. As to the second question, whether it was compulsory on the *Lion* to take a Pilot, the answer depends on whether this was a passenger Ship at the time of the collision; and this their Lordships are of opinion depends upon whether there were any Passengers on board the *Lion* at the time of the collision.

The facts are these: they cannot be more correctly set forth than in the judgment of the learned Judge in the Court below:—

"Having been seven days in *London*, the Captain wrote to his Wife and to his Father-in-Law to come to *London* and go with him to *Hull;* he did not write to the Owners, or tell their agents in *London*, or anybody, that he was going to take these persons with him; they paid nothing for their living on board the Ship; but they paid for their fare, in the circumstances about to be mentioned, 7*s.* 6*d.* each, which he swore positively was the proper second-class fare, though *Malcolm*, the Agent for the Owners of the *Lion*, as positively swore afterwards that it was the first-class fare. For this money no receipt was produced, though the Captain swore that he had paid it, and *Malcolm* that he received it. The Captain admitted that he had said nothing to either of these persons, previously to their coming on board, as to their payment

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of fare; that, he said, he arranged during the passage, but after the collision had happened; the Father-in-Law swore that the first time he ever spoke about his paying was when in *Hull*, and the Ship alongside the quay. The Captain admitted, on cross-examination and in answer to the Court, that he was aware that he was bound to pay light dues, unless he went in in ballast without Passengers on board; that he ought to have told the lighthouse authorities that he had Passengers on board, and that he had not done so. He said that he paid the fares to his Owners on his arrival in *Hull;* but Mr. *Malcolm* said that 'the settlement,' as he called it, was made about the middle of January, and after the correspondence with the *Trinity House*, or the Board of Trade, to which reference was made, and, therefore, it is to be presumed, after he knew that the Pilot had reported that there were no Passengers on board. The Captain also swore, and in this was confirmed by *Malcolm*, that his instructions were, never to take persons on board without payment as Passengers, except with special permission."

In this state of things, were the Captain's Wife and her Father Passengers?

They were on board on the invitation of the Captain without the privity of the Owners, who had not contracted any obligation to have them carried in the Vessel, and no duty was imposed on the Owners in relation to these two persons.

The meaning of particular words in an Act of Parliament, to use the words of *Abbott*, C.J., in *Rex* v. *Hall* (1), "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used." It is in this sense that the meaning of the word "Passengers" is to be here considered, and, so considered, their Lordships are of opinion, that the Captain's Wife and her Father were not Passengers within the meaning of the clause, as to the employment of Pilots, in the 17 & 18 Vict. c. 104, and as to the exoneration of Owners of Ships.

If the Ship was not carrying Passengers she was exempted from the compulsory pilotage by the 379th section of the *Merchant Shipping Act.* It becomes necessary, therefore, to decide what the position of the Owners is when the Vessel was in the charge of a duly licensed Pilot whom it was not incumbent on them to

(1) 1 B. & C. 136.

employ. The Pilot must therefore be considered as having been voluntarily selected by the Owners, who are responsible for his default whilst acting as Pilot in charge of their Ship, unless they can bring their case within the exoneration clause, section 388, which enacts that:—"No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such Ship, within any district where the employment of such Pilot is compulsory by law."

In the opinion of their Lordships this case is governed by the decision of *The Stettin* (1), the authority of which is recognised by *Kelly*, C.B., in the case of *The General Steam Navigation Company* v. *The British Colonial Steam Navigation Company* (2), the ground of which decision is explained by *Byles*, J., in delivering the judgment of the Exchequer Chamber (3).

The learned Judge expounds the 388th section as requiring, that the Pilot should be compulsorily employed within the district where the injury occurred, in order to exempt the Owners from responsibility for his default. This (he says) "obviates all the mischief which might be apprehended from Captains of Ships unnecessarily and improperly employing Pilots to escape the responsibility of navigation, while it preserves the sole responsibility of the Pilot in the whole of the district for which he was employed." He adds that their decision "does not conflict with the case of *The Stettin* (1), where the Pilot was taken on board, where and when by law there was no necessity to take him." This explanation will be found to be strictly applicable to the present case.

In answer to this, it is strongly objected on the other side that the case of *Lucey* v. *Ingram* (4) is directly at variance with the case of *The Stettin* (1), and that as it was not cited in the case of *The Stettin*, the authority of that case is consequently thereby weakened.

Their Lordships are of opinion, that there are two answers to this. In the first place it is to be observed that as the case of *Lucey* v. *Ingram* (4), had been under the notice and consideration of Dr. *Lushington* in several cases before he decided the case of *The Stettin* (1), it must be taken to have been present to his mind at that

(1) Br. & Lush. 199.
(2) Law Rep. 3 Ex. 349.
(3) Law Rep. 4 Ex. 247.
(4) 6 M. & W. 302.

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time; but, secondly (and which is more material, as it explains why Dr. *Lushington* did not think it necessary to refer to that case), upon a close examination it does not appear to have any conclusive bearing upon the case of *The Stettin* (1), and if so, it has not upon the present case.

The case of *Lucey* v. *Ingram* (2) was decided upon the 6 Geo. 4, c. 125, ss. 55 and 72, and though it was conceded in argument, that the sections are equivalent, or nearly so, to the 17 & 18 Vict. c. 104, s. 388, it does not so appear upon a minute examination. The 72nd section of 6 Geo. 4 made it incumbent on the Pilot to act, if he were required so to do by the Master or Owner of any Ship wanting a Pilot, and the former section, sect. 55, exonerates the Owners from responsibility, "for any damage which should happen by reason of the neglect, default, or incapacity of any licensed Pilot acting in the charge of such Ship under or in pursuance of any of the provisions of this Act."

This was held to include two cases, first, the case where the Pilot was bound to act when required; and secondly, the case where the Owners were bound to employ a Pilot; and Baron *Parke*, in delivering the judgment, refers to its comprehensive terms as an "extended exemption," and he suggests the probable policy from which this extended exemption arose (3).

That this decision is to be considered as properly to be referred to the special and extended exoneration enacted by the 6 Geo. 4, c. 125, is manifest as well from the judgment delivered by Baron *Parke* as from the observations of Dr. *Lushington* in the cases of *The Agricola* (4), and *The Eden* (5), and *per Kelly*, C.B., in *The General Steam Navigation Company* v. *The British and Colonial Steam Navigation Company* (6).

Lucey v. *Ingram* (2) was cited in argument in the case of *The Annapolis* (7), where Dr. *Lushington* refers to the ordinary principle of exemption as explained by him in the case of *The Maria* (8), and in *The Annapolis* (9), and he states this principle to be in strict accordance with that of the 17 & 18 Vict. c. 194, s. 388 (9).

(1) Br. & Lush. 199.
(2) 6 M. & W. 302.
(3) Ibid. 316.
(4) 2 W. Rob. 20.
(5) 2 W. Rob. 446.
(6) Law Rep. 3 Ex. 349.
(7) Lush. 301–4.
(8) 1 W. Rob. 106.
(9) Lush. 311–2.

The distinction between the sections in the two Statutes when compared is obvious:—6 Geo. 4, c. 125, s. 55: "And be it further enacted that no Owner or Master of any Ship or Vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed Pilot acting in the charge of any such Ship or Vessel under or in pursuance of any of the provisions of this Act, where and so long as such Pilot shall be duly qualified to have the charge of such Ship or Vessel, or where and so long as no duly qualified Pilot shall have offered to take charge thereof."

The Statute, 17 & 18 Vict. sect. 388, enacts, that "No Owner or Master of any Ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified Pilot acting in charge of such Ship, within any district where the employment of such Pilot is compulsory by law." It is plain, therefore, that the first clause gives immunity to the Owner whenever the Vessel is in the charge of any licensed Pilot, where he is qualified to have charge of the Vessel, or where no duly qualified Pilot has been appointed to take charge thereof; while the second clause, sect. 388, of the *Merchant Shipping Act* only applies to the case where the employment of the Pilot is compulsory by law.

Accordingly, contrasting the extended exoneration in 6 Geo. 4, c. 125, s. 55, with the more limited exoneration in 17 & 18 Vict. c. 104, s. 388, and the policy suggested by *Parke*, B., as the ground of the former, with that suggested by *Byles*, J., with reference to the latter, their Lordships are of opinion, that the true interpretation of the enactment by which the present case is governed depends on this, whether the employment of the Pilot was compulsory, and that it cannot be affected by anything decided in *Lucey* v. *Ingram* (1), and that the authority or soundness of the decision in the case of *The Stettin* (2) is not in any way prejudiced by the omission to notice the case of *Lucey* v. *Ingram* (3).

The 17 & 18 Vict. c. 104, s. 388, has been acted on in the case of *The Stettin*, and has also been clearly expounded in the judgment of the Exchequer Chamber in the case of *The General Steam Navigation Company* v. *The British Colonial Steam Navigation*

(1) 6 M. & W. 316. (2) Br. & Lush. 199. (3) 6 M. & W. 302.

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Company (1), and according to the principle of these decisions, the Owners are not exonerated from responsibility for the default of the Pilot whom they have selected and placed in charge of their Ship, when by law there was no obligation imposed on them to take such Pilot and put him in charge.

Having come to the conclusion that there were no Passengers on board the *Lion* at the time of the collision, their Lordships are of opinion that the Master was not under any compulsion to take a Pilot; and, secondly, that having taken a Pilot, even assuming that the Pilot was bound to act, this does not in such circumstances exonerate the Owners from responsibility for the errors committed by the Pilot in a case where they were not compellable to take a Pilot, and put him in charge of the Vessel.

In the observations their Lordships have made they have acted on the assumption that *West* was a duly licensed Pilot, and that he had charge of the Vessel; but it would be improper to part with this case without calling attention to the fact that *West* himself swears that he took charge of the Ship as a Waterman, and not as a Pilot. He was not engaged by the Captain, but was sent by *Charles Roots*, another Pilot; whether sent by the Owners or not does not appear.

Their Lordships, therefore, concur with the learned Judge of the Court of Admiralty in opinion, that the presence of the Captain's Wife and her Father in the *Lion*, in the circumstances of the case as detailed in the evidence, did not constitute them Passengers; that no act done after the collision could convert them into the character of Passengers if they did not previously fill that character; and also that the *Lion* had not on board of her at the time of the collision a Pilot employed by them under compulsion of law; and that the Owners of the *Lion* are liable to pay to the Owners of the *Yorktown* the damage done to her by the inexcusable collision of the *Lion;* and their Lordships will, therefore, humbly advise Her Majesty that the decision of the learned Judge of the Court of Admiralty be affirmed, with costs.

Solicitor for the Appellants: *Thomas Cooper.*

Solicitors for the Respondents: *Ellis, Parker, & Clarke.*

(1) Law Rep. 3 Ex. 330; S. C. 4 Ex. 238.

THE QUEEN . . . . . APPELLANT;

AND

MICHAEL MURPHY . . . . . RESPONDENT.

J. C.*
1869
June 22.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Criminal Procedure—Venire de novo—Felony—New Trial.

A Prisoner having been tried and convicted of a capital Felony, by a Court of Oyer and Terminer in *New South Wales*, and sentence of death passed, and the judgment entered up on the Record, an application was made to the Supreme Court, sitting in Banco, for a rule for a *Venire de novo*, on an affidavit which stated, that one of the jury had informed the Deponent, that pending the trial, and before the verdict, the jury having adjourned to an Hotel, had access to Newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering, that there had been a mis-trial, and ordered, an entry to be made on the Record of the circumstances deposed to;—that the judgment on the verdict should be vacated, and a fresh trial had. On appeal to Her Majesty in Council, *held*, by the Judicial Committee, acting on the case of *Reg.* v. *Bertrand* (1):

First, that the discretionary power of the Supreme Court to grant new trials does not extend to cases of Felony; and that a *Venire de novo* cannot be awarded after verdict upon a charge of Felony, tried upon a good indictment and by a competent Tribunal;

Secondly, that if a *Venire de novo* could be awarded upon an application by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion entered on the Record; and therefore,

Thirdly, that the Order for vacating the judgment, and for a *Venire de novo*, must be reversed.

IN this appeal the Appellant, the Hon. *James Martin*, Her Majesty's Attorney-General for the Colony of *New South Wales*, sought to obtain the reversal of a judgment of the Supreme Court, granting a *Venire facias de novo*, in the case of *The Queen* against the Respondent, *Murphy*, after verdict and sentence for a capital Felony, under the following circumstances:—

(1) Law Rep. 1 P. C. 520.

* *Present*:—SIR WILLIAM ERLE, SIR FITZROY KELLY (LORD CHIEF BARON), SIR R. PHILLIMORE (JUDGE OF THE HIGH COURT OF ADMIRALTY), and SIR JOSEPH NAPIER, BART.

J. C. 1869 ~~ REG. v. MURPHY. ——

On the 12th of August, 1867, an information was filed in the Supreme Court of the Colony, at *Sydney*, by the Attorney-General of that Colony, charging the Respondent with the murder of one *Samuel Hassen*. To this information the Respondent pleaded not guilty, and issue was joined thereon.

The Respondent was tried on the 19th, 20th, and 21st days of August, 1867, at the Session of the Court of Oyer and Terminer and General Gaol Delivery then holden, upon the above information, before Mr. Justice *Cheeke*, one of the Judges of the Court, and a jury.

After having heard the evidence for the Crown and the Prisoner, and having been addressed by the Counsel for the Crown and the Prisoner respectively, and charged by the Judge, the jury, on the 21st of August, retired to consider their verdict; and on the next day they returned into Court, and, by their Foreman, stated that they had not agreed, and were not at any time likely to agree, concerning their verdict; and having been then kept, without separating, for the space of upwards of three days and three nights—during more than twenty-seven hours of which they had been deliberating on the matters before them—they were discharged by the Judge from giving any verdict.

The Respondent was again tried on the same information at the next Session of the Supreme Court as a Court of Oyer and Terminer and General Gaol delivery, on the 10th, 11th, 12th, 13th, and 14th of September, 1867, before Mr. Justice *Faucett*, another of the Judges of the Supreme Court, and another jury; when the jury found that the Respondent was guilty of the murder charged, and thereupon the Respondent was sentenced to death.

It appeared that, after the adjournment of the Court on the evenings of the 10th, 11th, 12th, and 13th of September respectively, the jurors were lodged at *Butt's Metropolitan Hotel*, in *Sydney*, under the charge of the Sheriff. During the times when they were at such Hotel, and before giving their verdict, the jurors had access to the Newspapers of the day, which contained reports of the trial so far as it had gone. The heading of the report in one of such papers was "*The South Creek Murder Case*," and in one report was the following passage: "The witness was cross-examined, but was not shaken in his evidence." The jurors were also allowed, during

the time of their sojourn at the Hotel, to hold communication, without the permission of the presiding Judge, with persons other than the Officers in charge of them; but such communications had no reference to the matters in issue.

On the 19th of September, 1867, a rule *nisi* was granted by the Supreme Court, calling upon the Appellant to shew cause why a *Venire de novo* should not issue for the trial of the Respondent on grounds appearing in an affidavit of one *Hart*, referred to in the rule, and which grounds were, that the jurors, after they had been empannelled to try the issue, and during their sojourn at the Hotel, and before they delivered their verdict, were allowed the free use of the Newspapers of the day containing the report of the Trial so far as it had gone, and that intercourse, without reference to the matter in issue, and without the permission of the presiding Judge, was permitted between the jurors and other persons not being in charge of them during the time they were located at the Hotel.

On the 24th of September, 1867, the rule was, after reading further affidavits, and hearing Counsel for the Crown and for the Respondent, made absolute, and by such rule it was ordered, that an entry should be made on the Record of the Respondent's conviction of the charge, to the effect that, after the jury had been empannelled to try the case, and before they delivered their verdict, they were improperly allowed the free use of the Newspapers of the day, which contained reports of the trial as far as it had gone, in one of which Newspapers the heading given was "*The South Creek Murder Case*," and, lastly, that a *Venire facias de novo* should issue for the trial of the Respondent upon the charge contained in the information.

A suggestion in pursuance of the rule absolute was thereupon entered upon the Record, and an entry was also made on the Record, that it had been ordered by the Court that the judgment on the verdict should be vacated, and that the Sheriff should cause a new jury to be summoned for the trial of the issue joined upon the information aforesaid, and that the Prisoner was remanded to the custody of the Sheriff in order to take his trial on that information accordingly.

The Appellant, Her Majesty's Attorney-General for the Colony

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of *New South Wales*, afterwards presented a petition praying for special leave to appeal against the judgment of the 24th of September, 1867, vacating the judgment on the aforesaid verdict, and awarding a *Venire de novo;* and on the 29th of February, 1868, Her Majesty in Council gave the Appellant special leave to appeal (1).

In accordance with the rule of the Judicial Committee of the 12th of February, 1845 (2), the Judges of the Supreme Court transmitted their reasons for the judgment directing a *Venire de novo*, which, though, in substance, the same as contained in the report of the case in the *New South Wales* Supreme Court Reports (3), and originally delivered orally and *seriatim* by the Judges, yet being, for the purpose of this appeal, reduced into writing by the learned Judges, and involving a question of great importance respecting appeals in criminal cases, are here inserted.

The reasons of the Chief Justice, Sir *Alfred Stephen*, were as follows:—"I am of opinion, that there must be a *Venire de novo*. It is laid down in *Tidd's* Practice, vol. ii., p. 953 [8th Ed.], citing a note to *Davies* v. *Pierce* (4), that a *Venire de novo* is grantable when the jury have misconducted themselves. The authority quoted for this position is a case mentioned in *Rex* v. *Huggins* (5). In *Viner's* Abr., p. 469, tit. 'Trial' (K., g. 4), it is said that '*Capias* was awarded against the Under-Sheriff charged to keep a jury, and he permitted them to go and to have meat and drink, for he, upon his examination, confessed the matter, which is of record now, and he is an Officer, &c., and, therefore, *capias*, &c., and against the jury, because the matter is only surmise, *Venire facias* was awarded, and another *Venire facias* between the parties at issue to return a new jury.' In the margin it is added, '*Brooke* says, It seems that this matter was confessed, or notably proved,' Br. Jurors, pl. 12. In *Hale's* P. C., vol. ii. p. 306, it is said that, 'if, after the jury sworn, either party deliver a piece of evidence to the jury, and the verdict is given for him that delivered it, it shall avoid the verdict, but then this must appear by examination, and be endorsed upon the *postea* or verdict so as it appears of record.' The distinction between

(1) *Ante*, p. 35.
(2) 4 Moore's P. C. Cases, App. p. xxv.
(3) Vol. vi. p. 24.
(4) 2 T. R. 126.
(5) 2 Str. 887.

an award of a *Venire de novo*, and a rule for a new trial, appears to be, says Serjeant *Manning*, in a note to *Gould* v. *Oliver* (1), 'that the former is always founded upon some irregularity or miscarriage apparent upon the face of the record, whilst the latter is an interference by the Court, in the discretionary exercise of a species of equitable jurisdiction, for the purpose of relieving a party against a latent grievance. After a rule for a new trial, and a new trial had thereon, the record is in the same state as if no trial, except the last, had taken place, whereas upon a *Venire de novo*, the fact of the first trial, and the circumstances under which that trial became nugatory or abortive, and which rendered a second trial a matter, not of discretion but of right, necessarily appear on the record.' And, again, in the following page, *Hale*, P. C., vol. ii. p. 308, Lord Chief Justice *Hale* says, 'If depositions are read in Court to the jury, and after the jury sworn and going from the bar, the solicitor or prosecutor for the King or party, without consent of parties or order of the Court, deliver the copies of the deposition to the jury, if they find against him on whose part the copies were delivered, the verdict is good, but if they find for him on whose part they were delivered, and this appear by examination, and be (as it ought to be) endorsed upon the *postea* or record, the verdict shall be quashed, and a new *Venire facias*, or award for a new jury, shall be returned." If the Court is satisfied by evidence before it that there has been a miscarriage of justice, the authorities shew that the Court has authority to direct the matter to be entered on the record, and it thus appears on what ground the *Venire de novo* is awarded. I think, therefore, that it is our duty to direct the matter to be stated on the record, as was done in *Rex* v. *Fowler* (2). An entry was there made like the one I propose to have made in this case. I am satisfied that what occurred here was by the permission of the Officers in charge of the jury, they being, in fact, Officers of the Crown. The jurors were allowed to read, and some of them did, in fact, read, reports (or papers purporting to be reports) of the evidence daily given at the trial, or said to have been given, so far as it had proceeded. There is nothing to shew whether the evidence was rightly or wrongly reported. These reports may, as far as appears, have been written by the Crown or

(1) 2 M. & G. 238. (2) 4 B. & Ald. 273.

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the authority of the Crown. It is sufficient to say that the Officers of the Crown permitted the jurors to read reports, or what purported to be reports, of the trial. Such a proceeding, in my opinion, was wrong and dangerous in the last degree. The Newspapers might have contained a comment on the trial. In fact, the following passage was contained in the report, 'The witness was cross-examined, but was not shaken in his evidence.' What was done must be considered to have been done by one of the parties to the proceeding, and therefore it vitiates the verdict. I have come to this conclusion, although keenly alive to the absurdity of adhering to form rather than substance in the conduct of criminal proceedings. It is quite possible to pervert rules of practice so as to secure impunity to guilt. But I think that there has been in this case a substantial miscarriage of justice, or, at all events, an extreme risk of such miscarriage. The mischief is obvious, and the proceeding so dangerous that no Court could sanction it. It is better to allow the case to go down to another trial than to allow the verdict to stand. As to the effect of communicating with a juryman in respect to indifferent matters, it would be monstrous, I think, to say that a juryman should not receive a communication from his wife as to the illness of a child, or as to circumstances which might irretrievably injure his fortunes. I never understood that jurymen might not receive communications of this kind. In order to set aside a verdict on such a ground, it would be necessary to shew that some mischief had been caused by what had occurred."

Mr. Justice *Hargrave* stated his reasons as follows:—First: I concurred generally in the Chief Justice's elaborate statement in Court, and review of the old authorities as to writs of *Venire de novo* from very early date to the present time, but not having read the written reasons of the Chief Justice as now filed, I assume that these authorities justify the technical issue of this writ on this present occasion, on the ground that the trial was conducted with such a substantial and gross miscarriage of justice as required the whole trial to be treated as a nullity, and this independently of all consent from any party. Secondly: I think that the giving of printed Newspapers to the jurors during the trial, containing (as was admitted) alleged reports of the case composed by mere News-

paper *employés*, or any other unofficial bystanders, being the usual popular summaries of the evidence, interspersed with remarks upon the relative importance and effect of particular testimony, the demeanors of the witnesses, the reporter's opinions as to the effect and bearing of cross-examination, and the usual condensed popular narrative of the speeches of Counsel, and other Court proceedings of this trial—were circumstances which constituted a substantial miscarriage of justice, and which seemed to me to come strictly (however unintentionally) within the Common law offence of "embracery," as defined (by *Hawkins*, I., P. C., ch. 27 (8), secs. 1, 5, and other authorities, cited in 1 *Russell's* Criminal Law, ch. XXI. p. 264 [4th Ed.]) to be 'any practice which tends to affect the administration of justice by improperly working on the minds of jurors.' The jurors ought not even to be 'instructed by letters, persuasions, &c.,' but only by the strength of the evidence, and the arguments of Counsel in open Court. If such a practice as that under consideration should be now authoritatively sanctioned by this Court, or even for an instant tolerated, it is impossible to foresee the perversions of justice which may easily follow; and the Common Law and Statutes referred to by *Hawkins* and *Russell* were intended to prevent all such irregularities by making all such offences indictable. Thirdly: I think that the delivery of these Newspapers to the jury, whether by way of substitution for the perusal of the Judge's notes, or in addition thereto, was, in fact, a gross contempt of Court, and within the decisions of Lord *Langdale* in *Littler* v. *Thompson* (1), and of Lord *Cottenham* in *Lechmere Charlton's Case* (2), as an 'attempt by private communication to influence the conduct of any one invested with the duty of judicially disposing of matters pending in Court,' or 'to obstruct the ordinary course of justice.' I need scarcely point out that the delivery of these alleged reports, even though being open, and in Court, or even by consent of the Judge and of the parties, are circumstances not in the slightest degree altering the illegality of such conduct, as contrary to all judicial regularity and criminal procedure. Fourthly. I considered the decisions of the House of Lords in *O'Connell* v. *Reg.* (3), and of the Privy Council in *Bertrand's*

(1) 2 Beav. 129.

(2) 2 Myl. & Cr. 316.

(3) 11 Cl. & F. 155.

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Case (1), as strongly directed against all such exceptional novelties in criminal procedure, being necessarily calculated to render trial by jury 'a delusion, a mockery, and a snare,' and 'to interrupt the due and orderly administration of the law.' Many other mischiefs, theoretical and practical, arising from the course adopted in this case, were pointed out by Mr. *Pilcher* as Counsel for the Prisoner, but the above were the chief grounds of my own judgment. I think it right to add, that the report in 6 Supreme Court Reports, 24 to 35, is very erroneous in many particulars.

Mr. Justice *Faucett* added:—"The following is in substance what I said when giving judgment in this case. Having expressed my general concurrence in the observations made by the Chief Justice and Mr. Justice *Hargrave,* I then said, I am of opinion, that an irregularity has been committed, and the only question is, how it ought to be remedied. The Court cannot say, that the matters improperly brought before the jury did not influence their minds, The irregularity complained of was allowed by the Officer of the Crown who had charge of the jury, and the case is in this respect somewhat analogous to those cases in which evidence had been, without leave of the Court, handed in to the jury by one of the parties, or by the Attorney of one of the parties; but as I consider the act was an oversight on the part of the Officer, I prefer to rest my decision on the general ground that what purported to be a report of the evidence had got improperly into the hands of the jury, by which their minds might have been prejudicially affected, and that this was an irregularity. And, on the whole, I consider that this irregularity having taken place out of Court, and without the knowledge of the presiding Judge, was, in effect, such a misconduct on the part of the jury as ought to render the verdict void, and that, in accordance with and in analogy to the authorities cited in *Viner's* Abr., vol. xxi., tit. "Trial" G. g. 6 to 19, a *Venire de novo* ought to be granted. I also think, that the matter complained of ought to be set out on the record."

Sir *R. Palmer,* Q.C., and Mr. *Cohen,* for the Appellant:—

The circumstances of the case are very simple: though the jury were unable in the first trial to agree, yet on the second trial they

(1) Law Rep. 1 P. C. 520.

found a verdict of guilty, and sentence of death was thereupon pronounced upon the Respondent. No objections were taken on the trial, and no points reserved. Two days after, upon the simple allegation contained in the affidavit of *Hart*, who had been assigned by the Court to act as Attorney for the Prisoner, that he had been informed by one of the jurors that during the trial they had access to the Newspapers of the day containing a report of the trial as it proceeded, a rule for a *Venire de novo* was granted. There was no evidence that any of the jury availed themselves of such access to the Newspaper report, or even read or were influenced by it. And yet upon this meagre and inconclusive evidence, and upon an observation which appeared in the Newspapers, and to which the Chief Justice alone referred, though the Newspaper report does not seem to have been properly in evidence, namely, that the witness "was cross-examined, but was not shaken in his evidence," on the hearing of the rule *nisi* all the Judges below concurred in thinking, that there had been a mis-trial, and that the only remedy was the ordering a writ of *Venire facias de novo*. That, in effect, was granting a new trial, which, in a case of Felony, the Supreme Court had no power to do: *Reg.* v. *Bertrand* (1), in which *Reg.* v. *Scaife* (2) was referred to, but not followed. It is impossible not to appreciate the caution and tenderness towards the Prisoner which the decision of the learned Judges of the Supreme Court displayed, but we maintain that the Supreme Court, which is neither a Court of appeal nor a Court of Error, had no power to grant such a writ after a verdict given by a jury duly empannelled. Though there is a distinction between the ancient form of a *Venire facias de novo* and the modern practice of granting a new trial, yet in effect they are the same, the granting a new trial being the simpler and more ordinary form, and, therefore, adopted in modern times in all civil suits. A *Venire facias* can only issue upon matter appearing on the Record. In *Witham* v. *Lewis* (3) the distinction is taken between the old and the modern practice of a new trial. Here the Record, with the judgment, was complete; the reason stated as ground for a *Venire de novo* is matter suggested after entry of the judgment, and when the record was, in fact, complete. Even if the matter suggested were strictly on the Record, it is not such as would warrant a writ

(1) Law Rep. 1 P. C. 520. (2) 17 Q. B. 238. (3) 1 Wils. 55.

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of *Venire de novo*. To do that it must be such as will make the verdict null, *ipso facto*, without leaving any discretion in the Court. The passages from *Tidd's* Practice, *Viner's* Abridgement, and *Hale's* Pleas of the Crown, referred to and relied on by the Chief Justice in his reasons, do not warrant the conclusion arrived at; the case of *Davies* v. *Pierce* (1), cited in *Tidd's* Practice, vol. ii., p. 953, was in a civil, not a criminal proceeding. In *Viner's* Abr., tit. "Trial," G. g. 4, vol. xxi. p. 448, and I. g. 1, p. 457, many examples are given of circumstances which will vitiate a verdict; but they all shew why the verdict should be set aside before judgment. In *Rex* v. *Fowler* (2) the matter vitiating the verdict was brought before judgment; and, as far as our researches go, we can find no case in which a verdict has been set aside in consequence of new matter brought before the Court after judgment. [SIR WILLIAM ERLE:—In *Rex* v. *Fowler* the Court seems to have considered that the *Venire de novo* was erroneous; because the judgment is to the effect, that even if it be assumed to be erroneous, the consequence would be, that the sentence under the first judgment would stand unimpeached, and the Prisoner would gain nothing by reversing the second sentence. If the Court had been of opinion that there was no error in the Record, they would have simply affirmed the judgment.] If the reasons alleged by the Judges below are sufficient to support their judgment, any act or even observation of the jury while in the box, or considering the verdict, might be the means of vitiating a verdict after judgment. All the authorities shew that the only ground for a *Venire de novo* is, that there has been a mistrial, and the fact of such mistrial must be patent on the face of the Record: *Viner's* Abr., tit. "Trial," K. g., vol. xxi. p. 459, and cases there cited; *Hale's* Pleas of the Crown, vol. ii. p. 306; *Rex* v. *Hayes* (3). There is no pretence for saying, on the face of the Record here, that there has been a mistrial; the matter vitiating the trial must make the verdict null *ipso facto*, without leaving any discretion in the Court; so that if in a civil case a motion might be made in arrest of judgment, or the fact suggested, as error. If a *Venire facias de novo* were granted, what is to prevent the Prisoner from pleading

(1) 2 T. R. 126. (2) 4 B. & Ald. 273.
(3) 2 Ld. Raym. 1518.

that he has been previously arraigned? *Rex* v. *Fowler* (1); *Rex* v. *Keite* (2). The cases of *Littler* v. *Thompson* (3), and *Lechmere Charlton's Case* (4), referred to by the Chief Justice, as shewing that the allowance of access to Newspapers containing a report of the pending proceedings on the trial, constituted a contempt of Court, has really no bearing on the broad question at issue.

The *Solicitor-General* (Sir *J. D. Coleridge*), and Mr. *Archibald*, for the Respondent:—

This is not the question of granting a new trial in a criminal case. That, we admit, the Supreme Court of *New South Wales* had no power to do: *Reg.* v. *Bertrand* (5); but the granting a *Venire facias de novo* is a very different thing, and that, we contend, the Supreme Court had full power to do, and were well justified in doing, in the circumstances of this case. According to all the authorities a *Venire facias de novo* issues where there appears upon the face of the Record reason to avoid the proceedings, whether the ground for avoiding them is brought to the knowledge of the Court before or after judgment; 1 *Chitty's* Crim. Law, ch. xv., p. 653 [2nd Ed.]; *Winsor* v. *Reg.* (6); *Dunn* v. *Reg.* (7). *Campbell* v. *Reg.* (8), on a writ of error from a Court of Quarter Sessions, where it seems to have been the opinion of the Judges of the Court of Queen's Bench, that if a *Venire de novo* may be awarded on a defective verdict in Felony, it may be done by the Court of Error after judgment given in the Court below: *Archbold's* Crim. Law, pp. 158, 164 [16th Ed.], citing *Rex* v. *Keite* (2); and that whether judgment has been entered of record or not: *Rex* v. *Yeadon* (9); *Reg.* v. *Mellor* (10). There was in this case a substantial miscarriage of justice in the course of the second trial in allowing the jury the use of the Newspapers containing, as they did, a report of the case then on trial. This amounted to a mistrial, and warranted a *Venire de novo*. The jury ought only to be instructed by the strength of the evidence and the argument of Counsel in open Court. The allowing them to read Newspaper reports of the

(1) 4 B. & Ald. 273.
(2) 1 Ld. Raym. 138.
(3) 2 Beav. 129.
(4) 2 My. & Cr. 316.
(5) Law Rep. 1 P. C. 520.
(6) Law Rep. 1 Q. B. pp. 289, 391.
(7) 11 Q. B. 1026.
(8) Ibid. 799.
(9) 1 Leigh & C., Cr. Cas. R. 81.
(10) 1 Dea. & Bell. Cr. Cas. 468.

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trial as it proceeds has a tendency to interfere with the due and orderly administration of justice, and that is, according to all the authorities, sufficient to justify a *Venire de novo: Hale's* Pleas of the Crown, pp. 306–8; *Reg.* v. *Yeadon* (1); *Reg.* v. *Mellor* (2).

1869 Feb. 19.

Judgment having been reserved, was delivered by

SIR WILLIAM ERLE:—

Upon this appeal, it appears by the proceedings returned to this Court that the Prisoner *Murphy* was tried for murder at a Session of Oyer and Terminer and Gaol Delivery for the month of September, 1867, before Mr. Justice *Faucett*, and was convicted and sentenced; and all the proceedings, as far as appeared, were regular and in due form of law.

Afterwards, an application on behalf of the Prisoner, and upon an affidavit, was made to the Supreme Court sitting in Banco, in term, for a rule to shew cause why a *Venire de novo* should not issue for the trial of the said Prisoner, and, upon further affidavits, the rule was made absolute; and therein it was also ordered that a suggestion should be made on the Record to the effect that after the jury had been empannelled, and before verdict, the jurors were allowed, during certain adjournments of the Court for the night, by the Officers of the Sheriff having charge of them, to have access to and free perusal of certain Newspapers containing reports of the evidence from day to day; and that the last-mentioned trial, by reason of the matters so suggested, was not according to law, but was irregular and void. This suggestion was followed by an entry, purporting to be an order, that, for the cause aforesaid, the judgment on the said verdict be vacated, and that the Sheriff cause a jury anew to come.

It further appears by the same proceedings above referred to, that the only affidavit giving judicial knowledge to the Supreme Court of the alleged irregularity in keeping the jurors was that of the Attorney for the Prisoner, who deposed, "That he was informed by one of the jurors who acted on the said trial, and he verily believed, that after they had been empannelled to try the said case, and during their confinement at the Hotel

(1) 1 Leigh & C., Cr. Cas. R. 81. (2) Dea. & Bell, Cr. Cas. 468.

(where they were kept during adjournments), and before verdict, the jurors were allowed the free use of the Newspapers of the day which contained reports of the aforesaid trial as far as it had gone, in one of which Newspapers the heading given was the '*South Creek Murder Case.*'" These are the proceedings in the Courts below to which we think it necessary to advert as relevant to this appeal.

Upon the argument in this Court the question has been whether the above-mentioned Order for vacating the judgment upon the verdict and for a *Venire de novo* in order for another trial was valid, and their Lordships have come to the conclusion that the answer should be in the negative, both on the ground which their Lordships relied upon in the case of *Reg.* v. *Bertrand* (1), and also on the further grounds stated below:—

First, their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial.

In *Bertrand's* case the irregularity was that the evidence of the witnesses was read to the jury from the notes of the evidence on a former trial. Here the irregularity was in so keeping the jury during the course of the trial as that the jurymen might have had access to some Newspapers during that time: but the law is clear that the discretional power vested in certain Courts and cases to grant new trials does not extend to cases of Felony. The law on this subject was declared by their Lordships in the former case of *Reg.* v. *Bertrand*, and we consider that the law so declared governs the present case.

Each of these cases falls within the rule that no person ought to be put in peril twice on the same charge. The application of the rule is shewn in detail by *Blackburn*, J., in *Reg.* v. *Winsor* (2), who there states: "When the jury have been brought together, and the Prisoner has been given in charge, and the trial has commenced, the right course, if practicable, is that the jury should give their verdict convicting or acquitting the Prisoner. When the jury have once found a verdict of conviction or acquittal, the

(1) Law Rep. 1 P. C. 520. (2) Law Rep. 1 Q. B. 313.

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matter has become *res judicata*, and after that there can be no further trial." He further shews that a *Venire de novo* on the same indictment would be erroneous, and a new indictment on the same charge would be defeated by a plea of *autrefois acquit* or *convict*. These remarks relate to a verdict returned upon a good indictment for Felony before a competent Tribunal. Their Lordships cite this statement of the law to shew the finality of a verdict upon a charge of Felony when the indictment is good, and the Prisoner has been given in charge to a jury, in due form of law empannelled, chosen, and sworn, and a verdict of conviction or acquittal has been returned.

In the present case, if the Prisoner should have been tried and convicted upon the *Venire de novo* ordered to issue by the rule here appealed against, according to the passage just cited, a judgment thereon would be erroneous.

The cases in which a verdict upon a charge of Felony has been held to be a nullity and a *Venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, or person,—cases of verdicts so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon: but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of Felony delivered by a competent jury before a competent Tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the Court considers unsatisfactory. As to the two supposed exceptions to this rule against new trial in cases of Felony, *Rex* v. *Scaife* (1), was noticed in *Reg.* v *Bertrand* (2), and the other case of *Rex* v. *Fowler and Sexton* (3), was explained to be no decision in the course of the argument on this appeal.

Secondly, the farther grounds for sustaining the present appeal beyond those expressed in the judgment in *Bertrand's* case, relate both to the form of the proceeding in the Supreme Court when exercising appellate jurisdiction, under which the rule appealed against was granted, and also to the sufficiency of the evidence on which that Court acted in granting that rule.

Their Lordships are not aware of any principle either of the law of *England* or of this Colony by virtue whereof the Supreme

(1) 17 Q. B. 238. (2) Law Rep. 1 P. C. 520. (3) 4 B. & Ald. 273.

Court, sitting in *Banco* in Term, could take cognizance as a Court of appeal of the judgment pronounced by Mr. Justice *Faucett* at the Session of Oyer and Terminer, which had come to an end before the Session in *Banco* began; and although the relation of the Courts to each other in respect of appellate jurisdiction has not been ascertained by us with precision, still, whatever be that relation, we find no form of proceeding analogous to that which is required by the common law in proceedings when the aid of a Court of Error or Appeal is invoked, but the form is the form adapted to an application to the discretion of the Court for a new trial.

Then as to the sufficiency of the evidence of the facts on which the Court acted in granting the rule appealed against, their Lordships do not find any strictly legal evidence of any fact; they find nothing beyond an affidavit of mere hearsay information, obtained from a person who had been on the jury, but was then discharged, and this information, if admitted to judicial notice at all, shewed possible access to Newspapers, without shewing that they contained matter which tended to influence the jury improperly, or that the jury ever did, as a matter of fact, read the Newspapers.

There is also the further objection, that the supposed informant had been one of the jurymen, and the Courts here have at times expressed a reluctance, which we consider salutary, against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict.

The whole of the proceedings in the Supreme Court are referred to the Judicial Committee; and as their Lordships consider that the rule *nisi* for a new trial, and the rule absolute founded thereon, were each granted on insufficient grounds, both rules fail to produce any effect, and the conviction stands unimpeached thereby.

We do not examine the authorities cited for the Respondent, because none of them appear to us to sanction the notion that a verdict, even in a civil case, could be set aside upon an imagination of some wrong without any proof of reality. The suggestions upon which verdicts have been so set aside in civil cases have alleged traversable facts material and relevant, to shew that the verdict

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had actually resulted from improper influence, and we refer to the special verdict reported in XI. H. 4, Fo. 17, as affording an example of such facts as would, if stated in a suggestion on the record, have had the effect of setting aside the verdict.

The case in the Year Book, XI. H. 4, Fo. 17, we translate as follows (the original is transcribed below in the note (1)):—

"The Plaintiff in an assize had delivered an escrowment [writing to be used in case of need?] to a juryman on the panell, for evidence of his matter; and after the same juror, with others, had been sworn, and put into a house to agree on their verdict, he showed the writing to his companions, and the Officer who kept the enquest showed this matter to the Court, through which the Justices took the writing from the jurors, and took their verdict; and by the examining ("*per l'apposaile*") of the jurors the time of the delivery of the writing was inquired into, and it was found (*i.e.* by the jurors) to be as above stated; and as the verdict was for the Plaintiff, now he prayed judgment, *Gascoigne* and *Hull* said, that the Jury, after that they were sworn, ought not to see or carry with them any evidence, except that which was delivered to them by the Court, and by the party put in Court as the evidence shown; and inasmuch as they did the contrary, the Plaintiff ought not to have judgment."

This case, with the words of *Gascoigne* and *Hull*, has been frequently referred to in Abridgments and Treaties by *Brooke*, *Rolle*, *Hale*, *Viner*, and others; but the general words of those Judges, as well as of Judges in general, are to be limited in some degree by reference to the facts of the case in respect of which they were spoken, and the force of this case is not altered by transcription.

(1) "*Le Plaintiff en Assise livera un escrowm̃t a un Juror empanell' pur evidence de son matter: Et puis mesme le Juror ove auters fuit jurus, 't mis en un meason d'accord de lour verdit, il monstr̃ m̃ l'escrowm̃t a ses comp̃. 't le ministr̃, q̃ gard l'en̄st, monstra cest matter al Court, per que les Justices pristr̃ le scrowm̃t des Jurors, et pris-teront lour verdit, 't per l'apposaile des Jurors, le temps de livere del escrowment fuit enquis, 't fuit trove* ut supra, *'t pur ceo q̃ le verdit passa pur le Plaintiffe, ore il pria son judgement. Gasc. 't Hulls disoient, que le Jury apres ceo q̃ ils fuerent jur̃, ne devient veier, ne porter ovesq̄ eux nul autre evidence, sinon ceo que a eux fuit livere per le Court, et per le party mis en Court sur l'evidence monstre, 't entant que ils fier̃ le contrary, ceo fuit suspicious per que il ne duist judgement aver. Et puis le Plaintiffe dit, que l'escrowement prova mesme l'evidence, que il mesme dona a eux al barre, per que il ne fuit cy male, come s'il nust parle en evidence, &* non allocatur, *&c.*"

We take one reference to this case, as an example, from *Bro.* Abr. tit. "General Issue," Fo. 17, pl. 85, thus:—

After stating that an enquest must not take evidence privily, he adds:—"*Et par Gascoigne et Hull s'ils preigne escrowe extracur̃, et pass. pur le pl., si c̄ apiert s̄ examination p le Court, ceo est cause barrester le judg^t.*"—(11 H. 4, Fo. 17.)

So that the result of the examination, viz., that the verdict was not "according to the evidence," but upon evidence taken out of Court, from one party without the assent of the other, appeared by the finding of the jury, and was upon the Record, as *Brooke* understands the case, or the judgment could not have been arrested.

The special verdict here reported may be contrasted with the suggestion in the present case.

In the case 11 H. 4, 17, the Court, which had jurisdiction both to try the suit and to arrest the judgment, ascertained the fact of the misconduct of the Plaintiff by examining the jurors, while acting as jurors, and by their verdict. Judicial knowledge from this source is in contrast with the affidavit above described. Also the interest of a Plaintiff as a party may be contrasted with the supposed interest of the Queen (referred to in the judgment of the Chief Justice in the Court below) in an indictment in which, although it runs in her name, she has no interest beyond that of truth and right. Neither is the Sheriff her agent, as also there suggested: he emanates from the people, and is neither appointed by, nor can be dismissed by, nor is he paid by, the Queen; furthermore, the mere omission of his Bailiffs to clear a room in an Inn where jurors are confined, of the Newspapers coming there by the course of the Inn, is in contrast with the culpable craft of the Plaintiff, who prepared a statement of his case, and sought out a juryman into whom he probably infused a prejudice in his favour, and so influenced the verdict.

In conclusion, their Lordships desire to add that they are sensible of the importance of guarding the channels for information through which the minds of the jury are led to their verdict, and concur with the learned Judges of the Court below in their zeal for the prevention of any such misconduct in future; but they think that the Court was wrong in granting a new trial as a remedy for this misconduct, and that the mischief would be greater if uncertainty

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was introduced respecting the course to be pursued in administering the law relating to charges of Felony.

If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence. As there was, in the opinion of the Court below, irregularity in the trial of the Respondent sufficient to vacate the judgment, their Lordships have no doubt that, upon proper application on behalf of the Respondent, which they recommend to be made, such weight will be given to these remarks as they may appear to deserve. But, as between the Appellant and Respondent, their Lordships will advise Her Majesty that the appeal should be sustained without costs, and that the order for a new trial should be reversed.

Solicitors for the Appellant: Messrs. *Oliverson, Peachey, Denby, & Peachey.*

Solicitors to the Treasury, for the Respondent.

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4. —— Effect of not adhering to appeal. THE "CALABAR" - - - - - 238

5. —— In a question of fact the Judicial Committee is reluctant to reverse or disturb decision of Court below. THE "ALICE" AND THE "PRINCESS ALICE." THE "ENGLAND" 245, 253

6. —— The rehearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal reheard. *Ex parte* KISTO NAUTH ROY [274

7. —— An Order of a Colonial Court of Record committing for contempt, being discretionary, *held* not to be the subject of an appeal. MCDERMOTT *v.* THE JUDGES OF BRITISH GUIANA - - 341

APPEARANCE: *See* ECCLESIASTICAL LAW. 4.

ARREST.] Liability of Vessel in Foreign port, *held* to justify the Master resorting to Bottomry Bond for repairs and supplies. THE "KARNAK" 505

ASSIGNMENT.] The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a Bill of lading, so as to defeat an unpaid Vendor's right of stoppage *in transitu*.—*L. & S.*, carrying on business in *London* and *Hong Kong*, bought goods of *L.* and others, Merchants at *Manchester*, to be shipped to their firm at *Hong Kong*. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from *Hong Kong* to meet the acceptances of *L. & S.* given for the price of the goods, on receipt of the Bills of lading. *L. & S.* contracted for the carriage, and shipped the goods in a Vessel they engaged, and the Bills of lading deliverable to their Firm in *Hong Kong*, or their assigns, were signed by the Master and handed over to *L. & S.*, who accepted the draft of the Vendors for the amount of the purchase. Before the goods or Bills of lading reached *Hong Kong*, *L. S. & Co.*, being insolvent, and pressed by two

ASSIGNMENT—*continued.*

Banking Firms at *Hong Kong*, to whom they were largely indebted, in consideration of their debt to the Bank assigned to them the "whole of their property, premises, and chattels specified in a schedule thereto, with all the estate, right, title, interest, claim, or demand of *L. S. & Co.*, arising thereout or therefrom." The schedule, *inter alia*, enumerated "All goods and Bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the Bills of lading were indorsed and handed over to the Banking Firms, to whom the insolvent circumstances of *L. S. & Co.* at that time were well known:—*Held:* First, that pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid Vendors to stop the goods *in transitu*, and—Second, that the *transitus* had not ended before the arrival of the goods at *Hong Kong*, as the *transitus* continued while the goods were in charge of a third party, contracted with as carrier for the purpose of forwarding them. Rodger *v.* The Comptoir d'Escompte de Paris - - - 393

ASSIGNMENT OF RIGHT OF ACTION by Art. 1570 of the Civil Code of *Lower Canada*, exception to, by Art. 1485. Kierzkowski *v.* Dorion 291

ASSIGNOR AND ASSIGNEE, EQUITIES AFFECTING.] An Assignee of any security stands in the same position as the Assignor as to the equities arising from it. The case of a Bill of Exchange is exceptional, and is to be dealt with on special grounds. Rodger *v.* The Comptoir d'Escompte de Paris - - - - - 393

ATTORNEY.] By an Order of the High Court of Judicature in *Bengal* an Attorney and Proctor of that Court was struck off the Rolls for inserting in a Deed of Conveyance a false recital as to the consideration money, knowing the same to be false, and for attesting the execution of the Deed, and signing his name as a witness to the receipt of the consideration money, knowing that no such consideration had passed, or was intended to pass. Such Order, on appeal, discharged, the Judicial Committee being of opinion, that although the preparation of such a Deed, and the knowledge of such facts, would be circumstances of great weight against an Attorney cognizant of them in the event of such a Deed, upon or soon after its execution, being used as an instrument of fraud, yet, as the circumstances of its preparation were capable of being explained, and no fraudulent use of the Instrument had been made or attempted, no fraudulent motive alleged, and no injury directly or indirectly occasioned by it, the mis-statement upon the face of such a deed could not be considered sufficient in itself to warrant the striking an Attorney off the Rolls of the Court. *In re* Stewart 88

AVERMENT—Sufficiency of—Facts within Plaintiff's knowledge: *See* Pleading. 4.

BAILEES: *See* Bankers.

BANKERS.] In an action for damages against a Bank as Bailees for the negligent keeping of certain Railway Debentures placed in their care by a Customer, in the ordinary way of their business as Bankers, it appeared, that the Box containing such securities (of which the Customer kept the key) was kept in a strong room in the Bank, with the Boxes of other Customers, and specie and other securities belonging to the Bank. Access to this room was only obtained by passing through a compartment where a Cashier sat by day, and a Messenger slept at night. The strong room had two iron doors, which were opened by separate keys, which during the day were kept by the Cashier who occupied the compartment. One of the keys was kept at night by the Cashier of the Bank, and the other key by another Officer of the Bank. Beyond this strong room there were two other rooms, in the outer of the two, uncoined gold, and in the inner, bullion and unsigned notes were kept. The Manager of the Bank kept the key of the outer of these rooms, and one of the Directors of the Bank that of the inner. The owner of the Box had free access to the room where his Box was deposited during Banking-hours, in the presence of one of the Bank Clerks, when he had occasion to take out coupons from his Debentures, for collection. While in such custody the Cashier of the Bank abstracted the Debentures from the Box, and made away with them:—*Held*, that the Bank, as gratuitous Bailees, were not bound to exercise more than ordinary care of the deposits entrusted to them, and the negligence for which alone they would be made liable would have been, the want of that ordinary diligence which a reasonably prudent man takes of his own property of the like description. Giblin *v.* McMullen - - 317

BANKRUPT LAW: *See* Colonial Law. 3.

BARBADOES INSOLVENT DEBTORS ACT, No. 234, of 1846: *See* Colonial Law. 3.

BARRISTER: *See* Contempt of Court. 1.

BELGIAN LAW: *See* Foreign Law.

BENEFICE: *See* Ecclesiastical Law. 2.

BILLS OF LADING—Transfer of, by indorsement: *See* Stoppage in Transitu.

BOND: *See* Colonial Law. 5.

BOTTOMRY BOND.]—1. The extent of the authority conferred on the Master of a Vessel to bind the owners either of the Ship or cargo, is derived from, and governed by, the law of the Flag; and the existence of the necessity which the Maritime Law requires to validate the hypothecation of the Ship and cargo by bottomry, is to be ascertained by evidence in the usual manner. The meaning of the term "necessity," in respect of hypothecation by the Master, being analogous to its meaning in other parts of the law.—The Master of a Vessel, chartered from *Galveston, U.S.*, to *Liverpool*, received before sailing from the Charterer various sums in part payment of the freight, and after taking on board a cargo, sailed for the port of destination. The Vessel, having in the prosecution of her voyage met with bad weather, and suffered damage, put into *Bermuda*, where the Master incurred heavy expenses for repairs and supplies. The repairs were executed, and the supplies furnished, without any promise of a Bottomry Bond; but the law of *Bermuda* giving a right of arrest of the Ship to the Creditors for the repairs and supplies, the Master, to complete the voyage, having written to the Agent of the Owners

BOTTOMRY BOND—*continued.*
of the Ship, and of the cargo, and not receiving any answer within the time an answer might have been returned, raised the funds necessary for the payment of such supplies on bottomry of the Ship, cargo, and freight. On a suit brought by the Assignees of the Bond, the owners of the Ship not opposing, the Court below pronounced for the validity of the Bond, so far as it regarded the Ship, cargo, and freight, and the Ship was thereupon sold, but produced a sum far less than sufficient to cover the sum due on the Bond. The Consignees of the cargo, who were also entitled to the freight, claimed to retain in their hands the amount of freight, with interest and insurance, advanced by them in part payment before the commencement of the voyage, and paid the freight, short of that amount, into Court. The Court below disallowed this abatement, and ordered the whole freight to be paid into Court. On appeal:—*Held*, by the Judicial Committee, (1) that, in the circumstances, the Master was warranted in resorting to a Bottomry Bond, and that the necessity of the case warranted the hypothecation of the cargo as well as the Ship and freight, but, (2) as the latter was, by the agreement between the Charterer and the Master, in part paid in advance, the retention of the amount of such prepayment by the Consignees of the cargo, upheld, as the Master by hypothecating the chartered freight could give no right to more freight than the Owner had a right to demand from the Charterer. The "Karnak" - - - 505

2. —— The Master of a Ship, to raise money for necessary repairs, hypothecated the Ship and freight. The Bottomry Bond contained a clause which provided, that the obligation should be void if the Obligors should pay, in consequence of the loss of the Ship, such an average as by custom would have become due on the salvage, or if the Ship should be utterly lost, cast away, or destroyed, in consequence of the perils of the sea. The Ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port in a damaged state, and after being surveyed was found unseaworthy, and sold while existing in specie for a sum less than the amount of the Bond:—*Held*, by the Judicial Committee (affirming the judgment of the Admiralty Court):—First, that the doctrine of constructive total loss does not apply to Bottomry Bonds, as in the case of insurance between insurers and insured, and the Bondholder's claim to the entire proceeds of the sale upheld.—Secondly, that the above clause in the Bond did not apply when the Ship remained in specie, though so much damaged that it would have cost more to repair her than she was worth. The "Great Pacific" - - - - - 516

BREACH OF CONTRACT: *See* Contract.

BRITISH GUIANA.] Supreme Court of Civil Justice, power of, as a Court of Record, to commit for contempt. McDermott *v.* The Judges of British Guiana - - - - - 341

BURIAL SERVICE.] The Ordinary cannot compel an Incumbent, by Ecclesiastical censure, to perform the burial service on unconsecrated ground, in which the only entrance to the vault is to be found. Rugg *v.* Kingsmill - 59

CANADIAN CIVIL CODE: *See* Colonial Law. 5.

CEREMONIES: *See* Ecclesiastical Law. 4.

CERTIFICATE OF DISCHARGE OF BANKRUPT: *See* Colonial Law. 3.

CHANCERY—Jurisdiction of Court of *Bermuda*: *See* Jurisdiction. 4.

CHURCH: *See* Ecclesiastical Law.

CHURCH DISCIPLINE ACT—Duty of the Judge of the Arches Court to accept Letters of Request. Sheppard *v.* Phillimore - - - - 450

——: *See* Ecclesiastical Law. 2, 4; Letters of Request.

CITATION: *See* Ecclesiastical Law. 4.

CLERGYMAN: *See* Ecclesiastical Law.

COLLISION: *See* Pilot; Ship and Shipping. 2, 3, 4.

COLONIAL BAR: *See* Contempt of Court. 1.

COLONIAL COURT OF RECORD—Power to commit for contempt: *See* Contempt of Court.

COLONIAL LAW.]—1. A Testator, in *Lower Canada*, by his Will, devised and bequeathed his moveable and immoveable property, in specified portions, to his children, and directed that they should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the immoveables being in their respective lots, as devised by the Will, until the period of twenty years from his death.—Part of the immoveable property so devised to one of the children, who had confessed judgment in favour of a creditor, was seized by the Sheriff in execution. The Court of Queen's Bench, on appeal, reversing the decision of the Judge of the Superior Court, held that the restriction in the Will was valid according to the law in force in *Lower Canada*. Such decision reversed by the Judicial Committee, as being contrary to the general principles of jurisprudence as well as the old French Law prevailing in *Lower Canada*, founded on the Civil Law. Renaud *v.* Tourangeau - - - - 4

2. —— By the law prevailing in *Natal*, the registered title of an innocent purchaser clothed with the legal estate, prevails over the title of a Claimant of a mere equitable estate, although such equitable estate may be of priority of time. The Natal Land and Colonization Company *v.* Good - - - - - - 121

3. —— Although an adjudication in Bankruptcy, followed by a certificate of discharge in *England* under the Bankrupt Laws, has the effect of barring any debt which the Bankrupt may have contracted in any part of the world, and of putting an end to any claim; such proceedings do not supersede the authority of the Court at *Barbadoes* to inquire into frauds and offences committed against the law of Insolvent Debtors in that Island, in a proceeding had there previous to the adjudication of Bankruptcy in *England*, the Insolvent having again placed himself within the jurisdiction of that Court.—*G.*, a trader in the Island of *Barbadoes*, having left the Island in embarrassed and suspicious circumstances, was, under the Island Act, No. 234, of 1846, adjudicated an Insolvent, and his estate and effects administered under that Act. *G.* afterwards came to *England*,

COLONIAL LAW—*continued.*

and was adjudicated a Bankrupt for a debt contracted in *England*, and obtained a certificate of conformity under the Imperial Statute, 12 & 13 Vict. c. 106, s. 200, discharging him from all debts due by him when he became a Bankrupt. *G.* returned to *Barbadoes*, when the Court there, before whom the original proceedings in Insolvency were had, at the instance of the opposing Creditors, sentenced him, under the Island Insolvent Act, to eighteen months' imprisonment for fraud committed against the provisions of that Act:—*Held* (affirming the Order of the Court), that the Insolvent Court of *Barbadoes* having acquired jurisdiction in the first instance in the matter of the Insolvency retained such jurisdiction, so as to render *G.* on his return amenable to that Court for fraudulent acts committed by him, and the sentence passed on him confirmed. GILL *v.* BARRON - - - - - - 157

4. —— In a foreclosure suit, the Supreme Court at *Halifax*, on motion, set aside the pleas of the Defendant as false, frivolous, and vexatious, and by the same Order directed the foreclosure of the equity of redemption. On appeal, such Order was held irregular and set aside, the Judicial Committee (without deciding the merits) being of opinion that, though the pleas were inconsistent, multifarious, and embarrassing, the Supreme Court was bound, by the provisions of the 62nd and 63rd sections of part 3, ch. 134, tit. 36, of he *Nova Scotia* Revised Statutes, in respect to amendment of pleadings; and the suit remitted back to the Court below, with liberty for the Defendant to apply to amend his pleas, or in default that the pleas should be set aside. WALLACE *v.* MCSWEENY - - - - - - 180

5. —— Exposition and examination of the Usury Laws of *Lower Canada*.—In an action brought to recover a sum of money alleged to have been paid in excess upon a Contract for a loan of £4,875, made in the year 1845, of which £3,325 only was paid to the borrowers, the balance, £1,500, being retained by the Agent of the lender as a *bonus* or premium; no sufficient proof being given of the lender's knowledge of the retention of such *bonus* or premium (which was claimed by the Agent retaining it for alleged services performed in obtaining the loan) and no excess of payment on account of interest proved before the year 1853, when the law of usury in *Canada* was altered: such action held not sustainable, and the judgment of the Court of Queen's Bench in *Canada*, reversing a previous judgment of the Superior Court, upheld, though on grounds different from those stated by the Court of Queen's Bench.—By the old French law, which formerly prevailed in *Lower Canada*, when upon an usurious Contract the principal and legal interest had been fully paid, any money afterwards received by the lender beyond the legal amount due could be recovered back; a right of action, therefore, vested in the person so paying such usurious interest.—By Article 1,570 of the Civil Code of *Lower Canada* such right of action is assignable, the only exception being, in the case of "Judges, Advocates, Attorneys, Clerks, Sheriffs, Bailiffs, and other Officers connected with Courts of Justice," who are prohibited

COLONIAL LAW—*continued.*

by Article 1,485 of the same Code from becoming "buyers of litigious rights which fall under the jurisdiction of the Court in which they exercise their functions."—By the Statute law relating to usury formerly in force in *Lower Canada* (17 Geo. 3, c. 3, sect. 5), interest at the rate of 6 per cent. only was allowed, and all Contracts whereupon a greater interest was reserved were declared void, and the parties directly or indirectly taking a higher rate made liable to a penalty to the amount of treble the value of the moneys lent. The 16 Vict. c. 80, enacts, that no Contract thereafter for the loan or forbearance of money, made at any rate of interest whatsoever, and no payment in pursuance thereof, should make the party to such contract liable to any loss, forfeiture, or penalty, or proceeding civil or criminal, for any usury, any law or custom to the contrary notwithstanding; but provides that every such Contract shall be void so far only as relates to any excess of interest above 6 per cent. The effect of this Act is, that an usurious Contract no longer subjects a party to any penalty or forfeiture, but is invalid only so far as it stipulates for more than 6 per cent. interest. KIERZKOWSKI *v.* DORION - - - - - - 291

6. —— According to the law in force in *Saint Lucia* at the time of the conquest and capitulation of that Island in 1803, a family has no such property in their patronymic name as to entitle them to bring a civil action in the Island for a declaration that the name exclusively belongs to them, and to prohibit a stranger, who had assumed their name, from bearing or using it.—The French *Ordonnance* of 1555, not having been registered, never became part of the Law of *France*, affecting her Colonies.—The French *Ordonnance* of the 11th of April, 1803, prohibiting a change of name, except under certain prescribed formalities there enacted, not having been introduced in *Saint Lucia*, forms no part of the Law prevailing in that Island.—*Semble:* Long acquiescence by the members of a family in the assumption of their family name by a stranger would, even if such an action lay, operate as a bar to a suit to prohibit him from bearing or using such name so acquired by reputation. DU BOULAY *v.* DU BOULAY - - - 430

7. —— Article 289 of the *Coutume de Paris*, in force in *Lower Canada*, regarding the execution of Wills, enacts:—"*Pour réputer un Testament solennel, il est nécessaire qu'il soit écrit et signé du Testateur; ou qu'il soit passé par devant deux Notaires; . . . . et qu'il ait été dicté et nommé par le Testateur aux dits Notaires . . . . et depuis à lui relu en la présence d'iceux Notaires . . . et qu'il soit fait mention au dit Testament, qu'il a été ainsi dicté, nommé, et relu, et qu'il soit signé par le dit Testateur, et par les témoins; ou que mention soit faite de la cause pour laquelle ils n'ont pu signer.*"—A Testatrix, domiciled in *Lower Canada*, who was unable to write, sent for a Notary to make her Will, giving him directions as to the dispositions it was to contain, which he took down in writing. The Notary, in conformity with the instructions, prepared the Will and handed it over to her. The Testatrix afterwards consulted a Counsel on the subject of the Will, and he made

COLONIAL LAW—*continued.*
an alteration in the margin. Two days afterwards the Testatrix went to the Notary's Office, bringing with her the Will, which he perused, and seeing the alteration, drew his pen through it. He then sent for another Notary, and in the presence of the second Notary asked her, what were the dispositions she desired to make, which she expressed briefly to be all the dispositions contained in the Will. The first Notary then read over the Will to her, and she suggested certain alterations, which were made by him in the presence of the other Notary, and in his presence he re-read to the Testatrix the additions and corrections made. As the Testatrix could not write, the "*énoncé sacramental*" was as follows:—"*A declaré ne savoir ni écrire ni signer de le requise:*"—*Held* (affirming the judgment of the Court of Queen's Bench in *Lower Canada*, on the appeal side), that the execution of the Will was good, and that the requirements of the 289th Article of the *Coutume de Paris* had been sufficiently complied with, as the words "*dicté et nommé par le Testateur aux dits Notaires*" did not require, in express terms, that the Will should be written by a Notary at the time of dictation by the Testatrix. Evanturel *v.* Evanturel - - 462

COMMUNION TABLE, LIGHTED CANDLES ON: *See* Ecclesiastical Law. 4.

COMPROMISE.] A registered Joint Stock Company in *Bombay*, with limited liability, being in the course of voluntarily winding up under the Act of the Indian Legislature, No. XIX., 1857, sect. 69, and the Official Liquidators having entered into an arrangement for compromise with a class of Contributories, in discharge of their liabilities, for a specific sum, the "Indian *Companies Act*," No. X. of 1866, was passed. By sections 173 and 174 of that Act, power is given to the High Court at *Bombay*, to sanction compromises and arrangements. The Liquidators applied to the High Court, under the aforesaid Acts, to ratify the compromise above entered into, which the Court accordingly sanctioned and ordered. On appeal, *held*:—First, that under the 173rd and 174th sections of the Act, No X. of 1866, the power of the Liquidators extended to making a general compromise of claims upon Contributories as a class, abandoning an equal proportion in each case, notwithstanding the differences of position between the Contributories, or inquiring closely into the means of each individual Contributory, and—Secondly, that upon the evidence and the judicial knowledge of the existing state of affairs at *Bombay*, the Court had exercised a just discretion in the investigation, and the Order of the Court sanctioning the compromise affirmed. The Bank of Hindustan *v.* The Eastern Financial Association - 489

COMPULSORY PILOTAGE.] Liability of Owner of Vessel by Belgian Law for damage caused by the sole negligence of Pilot. The "Halley" *See* Pilot. [193

CONFLICT OF LAWS: *See* Foreign Law.

CONSIDERATION FOR TRANSFER OF GOODS: *See* Stoppage in transitu.

CONSTRUCTION.] Distinction between sect. 55 of the *General Pilot Act* (6 Geo. 4, c. 125), and the *Merchant Shipping Act* (17 & 18 Vict. c. 104), s. 388, as to the immunity of the Owners when the Vessel is in charge of a licensed Pilot. The "Lion." - - - - - 525

CONSTRUCTIVE TOTAL LOSS: *See* Bottomry Bond. 2.

CONTEMPT OF COURT.]—1. A contempt of Court being a criminal offence, no person can be punished for such unless the specific offence charged against him be distinctly stated, and an opportunity given him of answering.—A Barrister engaged in his professional duty before the Supreme Court at *Hong Kong*, was, without notice of the alleged contempt, or rule to shew cause, and without being heard in defence, by an Order of that Court, fined and adjudged to have been guilty of several contempts of Court in disrespectfully addressing the Chief Justice while conducting a cause. Such Order, upon a reference by the Crown to the Judicial Committee, under the Statute 3 & 4 Will. 4, c. 41, s. 4, set aside, and the fine ordered to be remitted, first, on the ground that the Order was bad, inasmuch as the offences charged were not of themselves such contempts of Court as legally constituted an offence; and secondly, that even if they had been so, no distinct charge of the several alleged offences was stated, and no opportunity given to the party accused of being heard, before passing sentence. *In re* Pollard 106

2. —— Leave having been given by the Judicial Committee (on an *ex parte* application) to appeal to Her Majesty in Council, against an Order of commitment for contempt, and a judgment refusing leave to appeal from such Order, made by the Supreme Court of Civil Justice of *British Guiana*; without prejudice to the question of the competency of Her Majesty to entertain an appeal from an Order of commitment made by a Court of Record inflicting punishment by fine or imprisonment for contempt; the Appellant objected, *inter alia*, that the Supreme Court of Civil Justice in *British Guiana* was not a Court of Record, and had no such power of committing as had been exercised. The Judicial Committee, considering the question of jurisdiction a preliminary question, limited the argument to that point: and upon a review of the Orders in Council and Ordinances establishing the Civil and Criminal Courts in *British Guiana* was of opinion, (1) that the Supreme Court of Civil Justice of that Colony was constituted a Court of Record, and had power to commit for contempt, and (2) that the exercise of such a power being discretionary was not the subject of appeal, and that the leave given therefore ought not to have been granted. McDermott *v.* The Judges of British Guiana - - 341

CONTRACT.] *Semble:* The maxim in Chancery that he who seeks equity must do equity, when applied to a case of partial non-performance of an agreement, includes the rule at law which, in actions for damages upon contracts, discriminates between a whole or only a partial failure of performance: the breach being a bar when it goes to the whole, but no bar to a partial failure. In which case the party injured is entitled by a cross action to compensation. Oxford *v.* Provand 135

CONTRIBUTORIES: *See* Compromise.

COVENANT TO PAY ANNUITY to separate use of *feme sole*, effect of subsequent marriage with covenantor. Fitzgerald *v.* Fitzgerald - 83

COSTS.] Decree of Court below partly varied. Each party directed to pay their own costs. Oxford *v.* Provand - - - - 135

COSTS AND DAMAGES.] The Admiralty Court in releasing a Foreign vessel, in a suit for wages, from arrest, declining to exercise jurisdiction, condemned the Plaintiff in costs and damages. Such part of the decree of the Admiralty reversed, as the suit was not ripe for hearing. The "Nina" [38

COUTUME DE PARIS—Construction of Art. 289: *See* Colonial Law. 7.

COVERTURE: *See* Deed.

CROSS-SUITS—APPEAL BY ONE PARTY: *See* Ship and Shipping, 2.

DAMAGE—Cause of, for personal injuries against ship. The "Beta" - - - - 447

DAMAGES FOR BREACH OF CONTRACT.] Rule of law in respect of part performance of contract. Oxford *v.* Provand - - - - 135

DAMAGES OCCASIONED BY COLLISION IN FOREIGN WATERS: *See* Foreign Law.

DECISIONS OVERRULED, &c.]—1. *Hore* v. *Becher* (12 Sim. 465) doubted. Fitzgerald *v.* Fitzgerald - - - - - - 83

2. —— The case of *Smith* v. *Condry* (1 How. Rep. (U.S.) 28) observed upon. The "Halley" [193

3. —— The case of *The Julia* (14 Moore's P. C. Cases, 210) approved. The "Alice" and The "Princess Alice" - - - - 245

4. —— *The Clarisse* (12 Moore's P. C. Cases, 340), and *The Neptune* (12 Moore's P. C. Cases, 346), followed. The "England" - - 253

5. —— *Westerton* v. *Liddell* (Special Report by E. F. Moore, Lond. 1857) followed. Martin *v* Mackonochie - - - - - 365

6. —— The case of *Ex parte Totty* (29 L. J. Ch. (N.S.) 702) distinguished. The Bank of Hindustan *v.* The Eastern Financial Association - - - - - - 489

7. —— The case of *The Stettin* (Br. & Lush. 199) followed. The "Lion" - - 525

DECREE FOR UNLIVERY OF CARGO, AND SALE: *See* Ship and Shipping. 1.

DEED.] A man by Deed covenants to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation. The Covenantor afterwards marries the Annuitant, and dies leaving her surviving:—*Held* (affirming the judgment of the Court below), that the annuity is not extinguished, but only suspended by the marriage, and that the Widow is entitled to recover arrears accrued subsequent to the death of her husband. Fitzgerald *v.* Fitzgerald - - - - - - 83

DEPOSIT BY CUSTOMER WITH BANKERS FOR SAFE KEEPING: *See* Bankers.

DEVISE: *See* Colonial Law. 1.

DOUBLE INTENDMENT: *See* Ambiguity.

ECCLESIASTICAL LAW.]—1. The grant of a Faculty for the appropriation of a vault in a Church or Chapel is entirely within the discretion of the Ordinary. The Ecclesiastical law requires, before such Faculty is decreed, that all persons interested in opposing the grant should be heard before the Ordinary. The Vicar or perpetual Curate of a Church, though entitled to officiate in and have free access to the Chancel, has no right to fees for the erection of monumental tablets, or for the construction of vaults in the Chancel. A faculty for that purpose may be legally granted without his consent; but he has a *personâ standi*, by reason of his position as Incumbent, to oppose the grant of such a Faculty.—A faculty for the appropriation of a family vault under the Chancel of a District Church, having been applied for by the lay proprietor of the great tithes, and the owner of the land immediately adjacent to and in the vicinity of the Church, was objected to by the Vicar of the Parish, because, among other reasons, the access to it being only from the exterior, and no Churchyard or burial ground attached, there was no consecrated ground outside the Church on which any part of the burial service could be performed; such Faculty was, however, granted by the Ordinary, and the grant thereof confirmed on appeal by the Judge of the Arches Court:—*Held*, by the Judicial Committee, that though the granting of such a Faculty was entirely within the discretion of the Ordinary, such discretion ought to be exercised so as to prevent the possibility of a misuse by the grantee, and that, in the circumstances, the grant ought only to issue on the condition that the grantee appropriated, and consented to the consecration, of a sufficient piece of ground near the opening of the vault, to be so consecrated for the sole and special purpose of burials in the vault, and such Faculty decreed accordingly.—The Ordinary cannot compel an Incumbent by Ecclesiastical censure to perform the burial service on the unconsecrated ground in which the only entrance to the vault is to be found. Rugg *v.* Kingsmill - - - - - - 59

2. ——. The shutting up and refusing to perform Divine Service in one of two Churches, forming together a distinct Parish and Benefice under an Order in Council, made pursuant to the 1 & 2 Vict. c. 106, and 2 & 3 Vict. c. 49, is an Ecclesiastical offence cognizable under the *Church Discipline Act*, 3 & 4 Vict. c. 86, and the Incumbent persisting in such a course, after notice from the Ordinary, may be proceeded against under that Act for having offended against the Ecclesiastical Law of the realm, by a contumacious refusal to obey the lawful order of his Bishop.—The 13 & 14 Car. 2, c. 4 (The *Act of Uniformity*), does not apply where there are two Churches in the same Parish, so as to require the Incumbent to perform morning and evening service in each of them every Lord's day, and the words of sect. 2 of that Statute "every Church, Chapel, or other place of public worship within this realm of *England*," must be read "in each Church" for which there is a Minister.—The jurisdiction given exclusively to the Bishop by the 109th section of the 1 & 2 Vict. c. 106, has reference only to proceedings taken under that Act, and does not oust the general jurisdiction of the Ecclesiastical Court for an offence committed against the Common

ECCLESIASTICAL LAW—*continued.*

Ecclesiastical Law.—*Quære:* Whether the refusal to perform service in one of two Churches in a Parish is an inadequate performance of Ecclesiastical duties within the meaning of the 77th section of the Statute, 1 & 2 Vict. c. 106. Rugg *v.* The Bishop of Winchester - - - 223

3. ——.] The issuing of the Writ, *de vi laicâ removendâ*, from the Common Law side of the Court of Chancery in *England* has fallen into desuetude, as the same relief can be given by Injunction in a case of obstruction to the induction of a party to a Benefice, to restrain all interference therewith.—Orders of the Court of Chancery of *Bermuda* refusing to issue a Writ, *de vi laicâ removendâ*, affirmed on appeal. *Ex parte* Jenkins - - - - - 258

4. —— In a proceeding against a Clerk in Holy Orders, under the *Church Discipline Act*, 3 & 4 Vict. c. 86, for offending against the Laws Ecclesiastical, (1) in kneeling or prostrating himself before the consecrated Elements, and (2) in using lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles were not wanted for light:—*Held*, on appeal (reversing the decree of the Arches Court), first, that, according to the Rubric, the Celebrant during the prayer of consecration in the order of administration of the Holy Communion must stand, and not kneel or prostrate himself before the consecrated Elements during the reciting of the prayer, and that the words "standing before the Table" apply to the whole sentence in the Rubric, and to all the acts directed to be done: that, therefore, a change of posture is a violation of the Rubric which immediately precedes the prayer of Consecration, and constitutes an Ecclesiastical offence within the meaning of the Uniformity Acts, 13 & 14 Car. 2, c. 4, ss. 2, 17, 24, taken in connection with 1 Eliz. c. 2, and is punishable by admonition under sect. 23 of the latter Act, and does not belong to the category of cases which, according to the preface to the Prayer Book, should be referred to the Bishop of the Diocese for his direction:—*Held*, further, that it is not open to a Minister of the Church, or to the Judicial Committee in advising Her Majesty as the highest Ecclesiastical Tribunal of appeal, to draw a distinction in acts which are a departure from, or a violation of the Rubric, between those which are important, and those which appear to be trivial, the object of the *Act of Uniformity* being, as the preamble expresses it, to produce "an universal agreement in the public worship of Almighty God:" and the rule laid down by the Judicial Committee in *Westerton* v. *Liddell* (Moore's Special Rep. 187) that, "In the performance of the services, rites, and ceremonies ordered by the Prayer Book, the directions contained in it must be strictly observed; no omission and no addition can be permitted," adhered to and affirmed.—*Held*, secondly, that it is unlawful to place lighted Candles on the Communion Table during the celebration of the Holy Communion, when such Candles are not wanted for the purpose of giving light, (1) as the use of lighted Candles, if intended as a ceremony, or ceremonial act, is not among the ceremonies which are retained in the Prayer Book, and must, therefore, be included among those that are abolished and prohibited by 1 Eliz. c. 2, ss. 4 and 27, which Statute is applicable to the present Prayer Book, and by which the Royal Injunctions issued in the first year of *Edward* VI. (A.D. 1547), even if they possessed statutable authority, were, so far as they could be taken to authorize the use of lights as a ceremony or ceremonial act, abrogated and repealed; and (2) if Candlesticks and Candles were intended to be as Ornaments when lighted, and used with reference to a service in which they are to act as symbols and illustrations, they are not Ornaments within the meaning of the Rubric, as they are not prescribed by the authority of Parliament as mentioned in the Rubric to the first Prayer Book; nor are the Injunctions of 1547 the "authority of Parliament" within the meaning of that Rubric; nor are lighted Candles subsidiary to the service, for they do not facilitate, much less are they necessary to, the service; nor can a separate and independent Ornament, previously in use, be said to be consistent with a Rubric which is silent as to it, and which, by necessary implication, abolishes what it does not retain.—Construction of the Rubric as to Ornaments, in the commencement of the Prayer Book, which provides that "such Ornaments of the Church and of the Ministers thereof, at all times of their Ministration, shall be retained and be in use as were in this Church of *England*, by authority of Parliament, in the second year of the Reign of King *Edward* VI." considered, and the following propositions laid down and decided in *Westerton* v. *Liddell* (Moore's Special Rep. 156, 160, 187), recognised and affirmed:—First, that the words "authority of Parliament" in the Rubric refer to and mean the Act of Parliament 2 & 3 Edw. 6, c. 1, giving Parliamentary effect to the first Prayer Book of *Edward* VI., and do not refer to or mean Canons or Royal Injunctions having the authority of Parliament made at an earlier period (Moore's Special Rep. 160).—Second, that the term "Ornaments" in the Rubric means those articles the use of which, in the services and ministrations of the Church, is prescribed by that Prayer Book (Ibid. 156).—Third, that the term "Ornaments" is confined to those articles (Ibid. 156).—Fourth, that though there may be articles not expressly mentioned in the Rubric the use of which would not be restrained, they must be articles which are consistent with, and subsidiary to, the services; as an organ for singing, a credence Table from which to take the sacramental bread and wine, cushions, hassocks, &c. (Ibid. 187.)—It is too late to object to a Citation, as shewing no Ecclesiastical offence to have been committed, after the accused Clerk has appeared without protest and prayed for Articles, which operates as a waiver.—There is no analogy between an indictment and the process for admonition under sect. 23 of 1 Eliz. c. 2, in respect to Ecclesiastical offences. Martin *v.* Mackonochie - 365

EQUITABLE PLEA: *See* Pleading. 4.

EQUITY: *See* Contract; Specific Performance.

EVIDENCE.] 1. *A.* purchased from *B.* lands in the Colony of *Natal*, and registered the same. *A.* afterwards mortgaged the lands of *C.*, and de-

EVIDENCE—*continued.*

livered to him the *grosse*, or copy, of his registered title deed. This mortgage was also registered. Default having been made in payment of the principal and interest of the mortgage money, *C.* brought a suit in the nature of a foreclosure suit, and obtained a provisional sentence, by which the same was declared executable in satisfaction of the mortgage debt, and the lands attached for the amount due upon the mortgage. Before any sale took place under such attachment, *D. & E.* obtained an interdict from the Supreme Court against the transfer, on the allegation that previously to the sale to *A.*, *B.* had sold the lands to them, and that *A.* had notice of such previous sale. *D. & E.* afterwards instituted a suit against *A.* (without making *C.*, the mortgagee, a party). The object of the suit was to set aside the original sale from *B.* on the ground that the sale and registration was a fraudulent transaction between *A.* and *B.*, and *D. & E.* obtained a judgment, whereby the Supreme Court adjudged the transfer to *A.* to be cancelled and set aside. In consequence of the interdict restraining the sale, *C.* instituted a suit against *D. & E.* and *A.* to set aside the interdict and enforce the provisional sentence obtained by him. In this suit the only evidence of the alleged fraud between *A.* and *B.* was the judgment in the suit by *D. & E.* against *A.* The Supreme Court at *Natal*, acting upon that judgment, decreed in favour of *D. & E.* Upon appeal, such judgment reversed by the Judicial Committee, on the ground that the judgment in the suit by *D. & E.* against *A.* was not admissible in evidence, being, so far as respected *C.*, *res inter alios acta*, and binding only on the parties to that suit; and that, in the absence of any evidence of fraud in the original transfer between *A.* and *B.*, the interdict obtained by *D. & E.* could not be sustained. The Natal Land and Colonization Company *v.* Good 121

2. —— At the close of the Plaintiff's case, the Defendant applied for a nonsuit, on the ground that the Bank, being gratuitous Bailees, there was no evidence given of such negligence as to render them liable. The Judge refused to stop the case, but reserved leave to move for a nonsuit. The jury found for the Plaintiff. The Defendant obtained a rule to set aside the verdict, and to enter a verdict for the Defendant, or for a judgment of nonsuit, and the Court made the rule absolute for a nonsuit:—*Held*, that such course was regular, as it was the duty of the Court to do what the Judge ought to have done at the Trial, when at the close of the Plaintiff's case there was no evidence upon which the jury could reasonably and properly find a verdict, as the Judge ought to have directed a nonsuit; and, as in every case before evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally any evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. Giblin *v.* McMullen - - - 317

EXECUTION OF WILL in *Lower Canada*: *See* Colonial Law. 7.

EXTENSION OF TERM OF LETTERS PATENT: *See* Patent.

EXTINGUISHMENT: *See* Deed.

FACULTY FOR VAULT—Discretion of Ordinary to grant, or impose conditions: *See* Ecclesiastical Law. 1.

FALSE RECITALS IN DEED: *See* Attorney.

FAMILY NAME, PROPERTY IN.] In *England* the assumption of a name, the patronymic of a family, by a stranger, who had never before been called by that name, is not the subject of a civil action, as by the English Law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another.—*Aliter*, as to the exclusive use of a name in connection with a trade or business, which right is recognised, and a party assuming it colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at Law or Equity. Du Boulay *v.* Du Boulay - 430

FELONY.] A Prisoner having been tried and convicted of a capital Felony, by a Court of Oyer and Terminer in *New South Wales*, and sentence of death passed, and the judgment entered up on the Record, an application was made to the Supreme Court, sitting in Banco, for a rule for a *Venire de novo*, on an affidavit which stated, that one of the jury had informed the Deponent, that pending the trial, and before the verdict, the jury having adjourned to an Hotel, had access to Newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering, that there had been a mis-trial, and ordered, an entry to be made on the Record of the circumstances deposed to;—that the judgment on the verdict should be vacated, and a fresh trial had. On appeal to Her Majesty in Council, *held*, by the Judicial Committee, acting on the case of *Reg.* v. *Bertrand* (Law Rep. 1 P. C. 526):—First, that the discretionary power of the Supreme Court to grant new trials does not extend to cases of Felony; and that a *Venire de novo* cannot be awarded after verdict upon a charge of Felony, tried upon a good indictment and by a competent Tribunal;—Secondly, that if a *Venire de novo* could be awarded upon an application by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion entered on the Record; and therefore,—Thirdly, that the Order for vacating the judgment, and for a *Venire de novo*, must be reversed. Reg. *v.* Murphy - - - 535

FORECLOSURE: *See* Colonial Law. 4.

FOREIGN CONSUL.] Practice relating to notice to, in suit against Foreign Vessel. The "Nina" [38

FOREIGN LAW.] In cases arising upon contracts entered into a Foreign country, the Courts of *England* inquire into and act upon the law of Foreign countries, where, by express reference, or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law becomes necessary to the construction of the contract itself. But in admitting the proof of Foreign law as part of the circumstances attending the execution of the contract, or as one of the facts of the existence of a tort, an English Court applies and enforces its own law, so far as it is applicable to the case

FOREIGN LAW—*continued.*

established, but will not enforce a Foreign Municipal law, and give a remedy in the shape of damages, in respect of an act which by the English law imposes no liability on the person from whom the damage was claimed.—Thus in a cause of collision promoted by the owners of a Norwegian Barque, against a British Steamer, in the High Court of Admiralty in *England*, for damage done in Belgian waters, alleged to have been occasioned by the negligent and improper navigation of the steamvessel, the owners of the Steamship pleaded, that the vessel was in charge of a Pilot whom they were compelled by the Belgian law to employ. The owners of the Barque replied, that by the Belgian law it is provided that the owners of a Ship which has done damage to another by collision are liable for the damage notwithstanding the vessel was in charge of a compulsory Pilot, and although the damage was occasioned by his negligence or want of skill. The owners of the Barque to this plea objected, that even if the article pleaded were true, they would not be liable in the Court of Admiralty in *England*. The Court of Admiralty admitted the plea of the Belgian law:—*Held*, by the Judicial Committee, reversing the decision of the Court of Admiralty, that the claim being founded on a tort committed in the territory of a Foreign State, the party claiming reparation in a British Court was not entitled to the benefit of the Foreign law against the admitted provisions of the Statute Law of *England* and the practice of the High Court of Admiralty in respect of compulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English Court will enforce a Foreign Municipal law, and give a remedy in the shape of damage, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed. The "Halley" - - 193

FOREIGN VESSEL: *See* Jurisdiction. 1.

FRAUD: *See* Attorney; Evidence; Indian Penal Code; Pleading. 1.

FREIGHT—Part paid in advance by the charterers: *See* Bottomry Bond. 1.

FRENCH LAW IN LOWER CANADA; *See* Colonial Law. 1, 5, 7.

GENERAL AVERAGE: *See* Bottomry Bond. 1.

GRATUITOUS BAILEES: *See* Bankers.

GROSS NEGLIGENCE.] The application of the term "gross negligence," in the case of gratuitous Bailees, considered and commented on. Giblin *v.* McMullen - - - - - 317

HORSE RACE.] In an action for the recovery of the amount of the stake deposited by one of the parties to a Horse race, to abide the event of the race, the jury found for the Plaintiff on the ground that the race, though run under the auspices of the *Australian Jockey Club*, was not run under the Jockey Club rules as provided by the agreement; the Court below granted a New Trial on the ground that the race was properly run under the agreement:—*Held*, by the Judicial Committee, on the

HORSE RACE—*continued.*

construction of the agreement and the rules of the Jockey Club which it referred to, that the finding of the jury was wrong, and that a New Trial was properly granted. Dines *v.* Wolfe - 280

HUSBAND AND WIFE: *See* Deed.

INCREASE OF STOCK: *See* Mortgage of Sheep.

INDIAN ACTS, No. XIX. of 1859, sect. 69, and No. X. of 1866, sect. 174: *See* Compromise.

INDIAN PENAL CODE: *See* Attorney.

INDUCTION TO BENEFICE: *See* Ecclesiastical Law. 3.

INJUNCTIONS OF 1547: *See* Ecclesiastical Law. 4.

INSOLVENCY: *See* Colonial Law. 3.

IRREGULARITY: *See* Colonial Law. 4.

JOINT NEGLIGENCE: *See* Ship and Shipping. 2.

JOINT STOCK COMPANY: *See* Compromise.

JUDGE AND JURY, FUNCTIONS OF: *See* Evidence. 2.

JUDGMENT.] A judgment in a suit between *A.* and *B.* in respect to real estate in the Colony of *Natal* registered in *C.'s* name as purchaser, holding the transaction fraudulent, is *res inter alios acta* as to *C.*, in a subsequent suit by *A.* against *C.* The Natal Land and Colonization Company *v.* Good - - - - - - 121

JURISDICTION.]—1. In a suit for wages by Seamen on board a Foreign Vessel the Court of Admiralty has jurisdiction, but will not exercise it without first giving notice in accordance with the directions of the 10th of the Rules and Orders of 1859, for the practice of the High Court of Admiralty, to the Consul of the nation to which the Foreign vessel belongs, and if the Consul, by protest, objects to the prosecution of the suit, the Court of Admiralty will determine whether it is fit and proper that the suit should proceed or be stayed. Such protest does not, *ipso facto*, operate as a bar to the prosecution of the suit, as the Foreign Consul has not the power to put a *veto* on the exercise of jurisdiction by the Court of Admiralty.—In such suit it makes no difference that the Plaintiff is a British subject: it is the nationality of the vessel, and not the nationality of the individual Seaman suing for his wages, that regulates the course of procedure.—Section 10 of the *Admiralty Court Act* of 1861, 24 Vict. c. 10, which gives jurisdiction to the High Court of Admiralty over any claim by a Seaman of any Ship (meaning thereby the Ship of any nation), only extends the previous jurisdiction in the ordinary case of wages, to wages under special contract, and disbursements on account of the Ship, and does not abolish the practice enjoined by the 10th of the Rules and Orders of 1859. A British subject having shipped as *Piloto*, or Mate, in a Portuguese vessel, under a written instrument called a *Matricula*, or Roll, which contained the terms of his engagement, instituted a suit and arrested the vessel on her arrival at her port of destination, on a claim for extra wages and disbursements. The Owner resisted the claim, in-

JURISDICTION—*continued.*

sisting that the vessel was a Foreign vessel, and that the *Piloto* and crew were engaged according to the law of *Portugal*, and had agreed, by the *Matricula*, to submit to the *Codigo Commercial* of *Portugal*, which, by Art. 1489, provides, that in case of any dispute between him and the Master, the Portuguese Consul in or near the port at which the vessel might chance to be, should have exclusive jurisdiction to try and determine such dispute according to the law of *Portugal;* and he relied on the protest of the Portuguese Consul and the law of *Portugal*, as stated by him on affidavit, as applicable to the case. The Judge of the High Court of Admiralty held, that although that Court had jurisdiction in a case for wages against a Foreign vessel, the exercise of such jurisdiction was discretionary, and refused to entertain the suit, released the vessel from arrest, and condemned the Plaintiff in costs and damages. On appeal, *held* by the Judicial Committee, first, that though the High Court of Admiralty had a general discretionary authority to entertain such a suit, yet the Plaintiff having by his agreement consented to be bound by the Portuguese law, the Court below rightly released the vessel from arrest, and determined that the suit ought not to be proceeded with in that Court; but, as the suit had not come to, and was not ripe for a hearing, the condemnation of the Plaintiff in costs and damages was premature, and that part of the decree of the Court below reversed. The "Nina" - - - 38

2. —— Reference by the Crown to the Judicial Committee, under Statute, 3 & 4 Will. 4, c. 41, s. 4, in the matter of a fine imposed for contempt by a Colonial Court. *In re* Pollard - - 106

3. —— Jurisdiction of Colonial Court to commit an Insolvent for fraud, notwithstanding an English certificate of discharge under the Imperial Statute, 12 & 13 Vict. c. 106, s. 200. Gill *v.* Barron - - - - - 157

4. —— The *Bermuda* Act of 1814, sec. 29, by which jurisdiction is conferred on the Court of Chancery of the Islands, with power "to examine, hear, judge, determine, and decree all matters, causes, and things whatever, as fully and amply to all intents and purposes whatsoever as the High Court of Chancery in *England* may or can do," does not necessarily confer on that Court the power to issue a Writ *de vi laicâ removendâ*. *Ex parte* Jenkins - - - - - - 258

5. —— The High Court of Admiralty has jurisdiction, under the 24 Vict. c. 10, s. 7, in a cause of damage instituted against a Ship for personal injuries.—Order of the Court of Admiralty rejecting the admission of a petition objecting to such jurisdiction affirmed, on appeal. The "Beta" - - - - - - 447

LEAVE TO APPEAL: *See* Appeal. 1, 2; Practice. 8.

LETTERS OF REQUEST.] The acceptance of Letters of Request, sent by a Bishop to the Arches Court of *Canterbury*, in proceedings taken under the *Church Discipline Act*, 3 & 4 Vict. c. 86, is not optional with the Dean of the Arches, the Bishop being empowered by the 13th section of that Act to send such cases "to the Court of appeal of the Province, to be there heard and determined according to the law and practice of such Court;" and it is not requisite that the Letters of Request should contain any reason for their being sent. Sheppard *v.* Phillimore - - - 450

LETTERS OF REQUEST—*continued.*

LETTERS PATENT: *See* Patent.

LEX FORI: *See* Foreign Law.

LEX LOCI: *See* Foreign Law.

LIBEL.] Action by an Assistant Master of the Government School at *St. Helena*, against the Commanding Officer, a member of the Executive Government in that Island, for a libel contained in a Letter written by the Defendant to the Colonial Secretary of the Island, stating that the Plaintiff was drunk and disorderly at a certain time and place. At the trial the Letter was not given in evidence, or the publication proved, but the Judge told the jury that they had to find, whether it was a privileged communication or not, and directed them to decide whether or not the Defendant had taken sufficient care to ascertain the truth of the statement made to the Colonial Secretary, and upon this it would be for him to decide whether the Defendant's communication was a privileged one or not. The jury found for the Plaintiff with damages, and the Judge, a few days afterwards, gave judgment concurring with the verdict:—*Held*, that the proceedings were altogether irregular, and judgment arrested, the Judge having taken upon himself the functions of the jury, first, in leaving it to them to determine whether the alleged libel was contained in an official document and a privileged communication; and, secondly, in not leaving it to them to say whether the Letter, if published, was *bonâ fide;* and if so found, then it was for him to determine whether, under all the circumstances, it was not a privileged communication.—The Defendant did not apply to the Court below for a new trial, but upon special application for leave, the Judicial Committee, after hearing Counsel on both sides, allowed the appeal on the ground of the Judge's misdirection:—*Held*, that it was too late at the hearing to object, that the Appellant ought to have applied to the Court below for a new trial. Stace *v.* Griffith - - - - 420

LIGHTED CANDLES ON COMMUNION TABLE: *See* Ecclesiastical Law. 4.

LIQUIDATORS—Powers of, to compromise claims of a class of Contributories. The Bank of Hindustan *v.* The Eastern Financial Association [489

LOWER CANADA, LAW OF: *See* Colonial Law. 1, 5, 7.

MARRIAGE by Covenantor to pay annuity with Annuitant:—*Held*, that the annuity was suspended only during coverture, and not extinguished. Fitzgerald *v.* Fitzgerald - 83

MERCHANT SHIPPING ACT (17 & 18 Vict. c. 104), s. 388: *See* Pilot. 2.

MORTGAGE OF SHEEP.] Mortgage of a certain number of branded sheep and herds of cattle on a Run in the Colony of *New South Wales*, with the issue, increase, and produce thereof, held limited to the issue and increase of such specific sheep, and not to include any sheep afterwards brought

MORTGAGE OF SHEEP—*continued.*
upon the Run, though in substitution of those specified in the original mortgage. Webster *v.* Power - - - - - - - 69

MORTGAGE OF SHIP: *See* Ship and Shipping. 1.

NATAL, LAW OF: *See* Colonial Law. 2.

NECESSITY: *See* Bottomry Bond.

NEGLIGENCE: *See* Bankers; Gross Negligence.

NEW TRIAL IN A CASE OF FELONY: *See* Felony.

NONSUIT: *See* Evidence. 2.

NOTICE: *See* Evidence. 1.

NOVA SCOTIA—Revised Statutes, part 3, ch. 13, tit. 36, "Pleading and Practice": *See* Colonial Law. 4.

OLD FRENCH LAW: *See* Colonial Law. 1, 5, 6, 7.

ORDONNANCES OF 1555 and 1803: *See* Colonial Law. 6.

ORNAMENTS: *See* Ecclesiastical Law. 4.

PARTIES TO ACTION: *See* Pleading. 4.

PASSENGERS: *See* "Pilot." 2.

PATENT.]—1. It is essential, in order to obtain an extension of the term of Letters Patent, for the Petitioner to establish (1) that the invention is of considerable merit; (2) public utility; and (2) inadequate remuneration.—Although the Judicial Committee will not adjudicate upon the validity of Letters Patent, the term of which is sought to be prolonged, yet where it appears from the specification that the subject matter is not sufficient to sustain such Patent, they will not, in the exercise of their discretion, recommend the Crown to extend the term. Where, therefore, the specification of a Patent described it as improvements in treating, deodorising and disinfecting, sewage and other offensive matter, and also for deodorising and disinfecting in general, and as being composed of two ordinary well-known chemical acids in combination, such acids being in common use for disinfecting purposes by the public before and after the Letters Patent:—*Held*, not to be an invention of such merit and utility as to justify an extension, to the detriment of the public in the use of known sanitary agents. *In re* McDougal's Patent - - - - - - 1

2. —— The subject matter of an invention was the employment of a metallic soap, composed of well-known chemical substances in common use, which the specification described as applicable for coating of iron and wood to prevent the fouling of ships' bottoms, and for other useful purposes. Prolongation of the term of such Letters Patent refused on the ground, first, that the recommendation of an extension being discretionary, it would be detrimental to the public interest to grant the exclusive benefit of a metallic soap made from substances in common use; and, secondly, that the Patentee had, as it appeared from the accounts, been adequately remunerated for his invention. *In re* McInnes' Patent - 54

PILOT.]—1. In a case of collision occasioned by a Vessel under compulsory pilotage, where no contributory negligence on the part of the Master and crew is proved, the Pilot in charge is solely responsible, and the owners are exempt from the consequences of his neglect or default. It is the province of the Pilot in giving directions for the navigation of a steam Vessel of which he is in charge, to determine the rate of speed at which she should proceed. The "Calabar" - 238

2. —— It is not compulsory on a passenger Ship to take a licensed Pilot on board when she is not carrying Passengers: and the Owners are responsible for the negligence of the Pilot, where they were not compellable to put him in charge of their Vessel.—The payment of a fare is necessary to constitute a Passenger within the meaning of the compulsory pilotage sections of the *Merchant Shipping Act* (17 & 18 Vict. c. 104).—Where, therefore, the Wife and Father-in-Law of the Captain were on board a Vessel (usually carrying Passengers, but not on a passage voyage at the time), by invitation from the Captain, without the privity of the Owners, who had neither paid, nor agreed to pay, any fare, before a collision took place; such persons were *held* not to be passengers within the meaning of the Act, so as to exonerate the Owners from the damage occasioned by the Pilot's default. The "Lion" - 525

PLEADING.]—1. *Semble*, fraud not specifically charged by the Bill cannot be relied on as a ground of relief in a Court of Equity. Webster *v.* Power [69

2. —— Inconsistent, multifarious, and vexatious pleas. Provisions of *Nova Scotia* Revised Statutes, sects. 62 and 63, of part 3, ch. 134, tit. 36, in respect of amendment of. Wallace *v.* McSweeny [180

3. —— The rule, that a party seeking redress for an injury can only recover "*secundum allegata et probata*," applies only to cases where the averments alleged in the pleadings are material to the issue raised.—Where, therefore, in a case of collision caused by a Vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previous to the collision was incorrectly pleaded and alleged by the Vessel proved to be entitled to redress, it was *held* by the Judicial Committee, that the Vessels not being in motion, their previous relative bearing when at anchor was not such a material fact to the issue, namely, which Vessel caused the collision, as to render the actual proof of the damage of no avail, and so entitle the offending party to the benefit of the rule.—*Semble*: In the case of a collision between two Vessels originally at anchor, the bearing of one Vessel with respect to the other is not such a material fact as necessary to be stated upon the issue raised between the parties. The "Alice" and "Rosita" - - - - - 214

4. —— In an action against a Surety to recover a part of a debt, by the first and second counts the Plaintiffs declared as indorsees of a Bill of Exchange drawn by them, and accepted by *H.*, indorsed by the Plaintiffs to the Defendant, and by him to the Plaintiffs; the third and fourth counts were upon another Bill of Exchange; and the fifth count was upon a deed whereby the

PLEADING—*continued.*
Defendant bound himself to secure payment by *H.* of his two acceptances. The counts upon the two Bills averred that the Plaintiffs indorsed the Bills to the Defendant without consideration, in order that they might be indorsed by the Defendant to the Plaintiffs for the purpose of the Defendant becoming Surety for the payment of the Bills by the acceptor, *H.*, to the Plaintiff. As to a sum of £4,606, part of the money so alleged to have been secured by the Bills and Deed, the Defendant, to the five counts, pleaded, on equitable grounds, that the two Bills which were guaranteed by the Defendant had been given for the balance of the purchase-money for certain Stations in *New South Wales*, previously purchased by *H.* from the Plaintiffs, under an agreement which provided, that in case of any dispute between the Vendors and the Purchaser as to any matter connected with the sale, such dispute should not annul the sale, but should be referred to arbitration in the manner therein stated; and the plea further stated, that a dispute had arisen as to the extent of land comprised in the Stations, that *H.* had appointed one *S.* as his Arbitrator, that the Plaintiffs neglected to appoint an Arbitrator, and that *S.* made his Award concerning the dispute, and thereby awarded that the Plaintiffs should pay to *H.* £4,606, in satisfaction of his claim. The plea also stated, that *H.*, before the commencement of the suit, claimed and offered to deduct and set off the sum of £4,606 against an equal amount in price:—*Held*, first, that the plea constituted a good equitable defence to the action, as, from the nature and terms of the Contract set forth in the plea, the compensation admitted to have been awarded was an abatement of the price of the Stations, and reduced *pro tanto* the amount of the purchase-money then unpaid, and as in equity the Defendant might have claimed the benefit of the amount of compensation awarded as a deduction, he was entitled to put this forward as a defence, on equitable grounds, to so much of the cause of action as was covered by that amount:—Secondly, that it was not necessary to the validity of the plea, that it should expressly aver that no more of the purchase-money was due than the amount secured by the Bills, or that, in the absence of an express averment, it must by the rule of pleading be taken against the Defendant, that the fact was otherwise, as the rule does not apply to the pleading of facts which lie peculiarly within the knowledge of the opposite party:—Thirdly, that as the Plaintiffs did not reply and avoid the plea on equitable grounds, but demurred, the allegations in the plea were to be taken without any denial or qualification, and every fair and reasonable intendment made.—*Held*, further, that in considering the validity of the equitable plea with respect to parties, it was necessary to bear in mind, that *H.* was not a necessary party to the action, as a Court of Equity could, without making *H.* a party, grant an unconditional injunction restraining the Plaintiffs from suing out execution upon a judgment, so far as related to the sum of £4,606, to which the plea applied. Murphy *v.* Glass **408**

PORTUGUESE COMMERCIAL CODE, Art. 1489. The "Nina" - - - **38**

PRACTICE.]—**1.** Order made by the Judicial Committee on application of the Respondents in a pending appeal, for unlivery of the cargo and sale of the mortgaged ship, the unlivery and sale of which had been decreed by the Court of Admiralty. The "Jeff Davis" - - **19**

2. —— Proceedings stayed in the Colony, pending an appeal in a criminal matter to the Queen in Council. Reg. *v.* Murphy - **35**

3. —— In circumstances, special leave to appeal granted, although the amount involved in the action was under the appealable value, Rs.10,000. There being (1) an important question of law raised, and eleven other actions brought involving the same question of law, and which had been directed by an Order of the Court below to be heard upon the same evidence and concluded by the same judgment; and (2), the aggregate amount involved in the actions being more than the appealable value. Ko Khine *v.* Snadden - - - - - **50**

4. —— The Judicial Committee, though unwilling to interfere with the discretion exercised by the Judge of the Court below in questions of salvage, either by increasing or diminishing the sum awarded, will nevertheless, where, in their judgment, there has been excess in the amount, or the sum awarded is manifestly insufficient, exercise their own judgment as to the proper remuneration to be awarded and apportioned among the Salvors. The "Chetah" - - **205**

5. —— *Semble*, the Owners of the Vessel proceeded against, and decreed to be solely to blame, having been dismissed from the suit by reason of the Vessel being in charge of a compulsory Pilot; and having neither appealed from the decree nor adhered to the appeal brought by the Owners of the Vessel injured (the Plaintiffs in the Court below), cannot, in such circumstances, raise the questions whether their Vessel was free from blame, or whether both Vessels were equally in fault, but are confined to the points raised by the appeal, whether the Pilot was solely to blame, or whether there was not contributory negligence on the part of the Master and crew of the Vessel causing the damage. The "Calabar" - **238**

6. —— Though the Judicial Committee will not lay down any exclusive rule as to appeals from judgments of the Court below upon questions which are entirely of facts; yet they are most reluctant to come to a conclusion different from that of the Judge of the Court below, merely on a balance of testimony; the Judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses. The "Alice" and "The Princess Alice" - - **245**

7. —— In reviewing decisions in salvage suits in respect of the sums allotted by the Admiralty Court for salvage services, where there is more than one salving Vessel, the Judicial Committee, adhering to the rule laid down in *The Clarisse* (12 Moore's P. C. Cases, 340) and *The Neptune* (12 Moore's P. C. Cases, 346), will not, unless under strong circumstances, interfere with the judicial discretion of the Judge of the Court below. The "England" - - - **253**

8. —— In granting special leave to appeal from a judgment in an action in which damages were awarded, the Judicial Committee imposed

PRACTICE—*continued.*

terms on the Petitioner, in addition to giving security for costs, to find security for the amount of the damages awarded by the jury, and upon the compliance of such terms, ordered execution of the judgment of the Court below to be stayed. Stace *v.* Griffith - - - - 420

9. —— The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Courts in *India*, unless it can be shewn that the Court has acted upon an erroneous principle. The Bank of Hindustan *v.* The Eastern Financial Association - - 489

PRAYER BOOK: *See* Ecclesiastical Law. 4.

PRIVILEGED COMMUNICATION: *See* Libel.

PROFESSIONAL MISCONDUCT: *See* Attorney.

PROFITS: *See* Patent. 2.

PROLONGATION OF TERM OF LETTERS PATENT: *See* Patent.

PROSTRATION BY CELEBRANT DURING CONSECRATION PRAYER: *See* Ecclesiastical Law. 4.

PROTEST: *See* Ecclesiastical Law. 4; Jurisdiction. 1.

REGISTRATION: *See* Colonial Law. 2.

REHEARING.] A rehearing will not be allowed except under very special circumstances. *Ex parte* Kisto Nauth Roy - - - 274

RES INTER ALIOS ACTA: *See* Evidence. 1.

RES JUDICATA.] There were cross suits respecting a collision between a Steamer and a Sailing-vessel. The Admiralty Court held both to blame. The Steamer alone appealed in both suits:—*Held*, that as the Sailing-vessel had not appealed from the decree which declared she was in the wrong, such decree operated as *res judicata* that the allegations made in her suit were not substantiated. The "City of Antwerp" and The "Friedrich" - - - - - - 25

RESTRAINT UPON ALIENATION OR INCUMBRANCE: *See* Colonial Law. 1.

RESTRAINT UPON ANTICIPATION: *See* Deed.

RITES AND CEREMONIES: *See* Ecclesiastical Law. 4.

ROBBERY BY SERVANT OF GRATUITOUS BAILEE: *See* Bankers.

RUBRIC, CONSTRUCTION OF. Martin *v.* Mackonochie - - - - 365

SAILING REGULATIONS: *See* Ship and Shipping. 2.

SAINT LUCIA, LAW OF: *See* Colonial Law. 6.

SALVAGE.] Where, upon a review of the evidence of the services rendered, the Judicial Committee were of opinion (being assisted by the Nautical Assessors of the Court) that the services performed, though highly meritorious, were greatly overrated by the Judge of the Court below, they reduced the sum awarded and apportioned for salvage services, by more than one-half.—*Semble*:—Salvage is a reward for services actually conferred, and not for services attempted to be rendered. The "Chetah" - - 205

SECUNDUM ALLEGATA ET PROBATA: *See* "Pleading." 3.

SERVICE IN TWO CHURCHES CONSTITUTING ONE BENEFICE: *See* Ecclesiastical Law. 2.

SHIP AND SHIPPING.]—1. Order made by the Judicial Committee, on application of the Respondents in a pending appeal, for unlivery of the cargo and sale of a mortgaged Ship, the unlivery and sale of which had been decreed by the Court of Admiralty.—Such decree afterwards affirmed. The "Jeff Davis" - - 19

2. —— It is a rule in cases of collision between a Steamer and a sailing ship, that although the latter may have been guilty of misconduct, or may not have observed the general steering and sailing Regulations, yet the Steamer will be held culpable, if it appears it was in her power to have avoided the collision.—Where a Steamer is charged with having omitted to do something which ought to have been done, proof of three things is required:—first, that it was clearly in the power of the Steamer to have done the thing charged to have been omitted; secondly, that if done, it would in all probability have prevented the collision; and, thirdly, that it was such an act as would have occurred to any Officer of competent skill and experience in command of the Steamer.—In cross suits between a sailing-vessel and a Steamer, the Court of Admiralty held both vessels to blame, and decreed the damages sustained to be equally divided between them. Such decree reversed on appeal, as the case of the sailing-vessel, setting forth the alleged negligence on the part of the Steamer, had not been proved. The "City of Antwerp" and The "Friedrich" [25

3. —— In a cause of collision promoted by the owners of a Norwegian Barque, against a British Steamer, in the High Court of Admiralty, in *England*, for damage done in Belgian waters, alleged to have been occasioned by the negligent and improper navigation of the steam-vessel, the owners of the Steamship pleaded, that the vessel was in charge of a Pilot whom they were compelled by the Belgian law to employ. The owners of the Barque replied, that by the Belgian law it is provided that the owners of a Ship which has done damage to another by collision are liable for the damage notwithstanding the vessel was in charge of a compulsory Pilot, and although the damage was occasioned by his negligence or want of skill. The owners of the Barque to this plea objected, that even if the article pleaded were true, that they would not be liable in the Court of Admiralty in *England*. The Court of Admiralty admitted the plea of the Belgian law:—*Held*, by the Judicial Committee, reversing the decision of the Court of Admiralty, that the claim being founded on a tort committed in the territory of a Foreign State, the party claiming reparation in a British Court was not entitled to the benefit of the Foreign law against the admitted provisions of the Statute Law of *England* and the practice of the High Court of Admiralty in respect of com-

SHIP AND SHIPPING—*continued.*

pulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English Court will enforce a Foreign Municipal law, and give a remedy in the shape of damage in respect of an act which, according to its own principles, imposes no liability on the person from whom the damage is claimed. THE "HALLEY" [193

4. —— Where, therefore, in a cause of collision in which the evidence was entirely oral, and the Judge of the Court below, assisted by Trinity Masters, determined on the evidence which Vessel was in fault, and decreed damages accordingly: the Judicial Committee approving the finding, affirmed that judgment, and dismissed the appeal with costs. THE "ALICE" AND THE "PRINCESS ALICE" - - - - 245

SPECIAL LEAVE TO APPEAL: *See* APPEAL. 1, 2.

SPECIFICATION OF INVENTION: *See* PATENT.

SPECIFIC PERFORMANCE.] In a suit for specific performance of an agreement, vague in its language, a Court of Equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement.—*P. & Co.* entered into an agreement in writing with *O. & Co.* for the transfer to them of the unexpired term of a lease held by *P. & Co.* of land and houses at *Shanghai;* and to build or finish certain houses thereon; to proceed with the building at once; to consult *O. & Co.'s* wishes in building the houses then in progress, and in building other houses not then commenced. *O. & Co.*, on their part, agreed to take the term so to be transferred, and to pay a certain rent divided into three portions, the liability for each portion to begin from the time when the house to which that portion related was finished by *P. & Co.*, and possession delivered over by them to *O. & Co.* Both parties further agreed that a proper contract should be drawn for their mutual execution by a Solicitor named by them. No such contract, however, was executed. Possession was given, and the buildings altered by *P. & Co.* at *O. & Co.'s* instance:—*Held*, decreeing specific performance of such agreement, (1), that the terms of the agreement expressed with sufficient clearness the intentions of the parties to bind them, from the time it was made, to do the several acts stipulated for each to perform; (2), that the stipulation that a proper contract should be made by a legal adviser was so isolated from the other stipulations in point of sequence that it might be performed either directly after the signing of the memorandum of agreement or when possession was given of the first house specified, or at any subsequent time, either before or after the completion of all or any of the houses to be erected:—*Held*, further, that that part of the agreement which provided that the wishes of *O. & Co.* should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced, having regard (1) to the surrounding circumstances, and

SPECIFIC PERFORMANCE—*continued.*

(2) to the fact of a part performance by *O. & Co.* in respect of the buildings and alterations of the houses. OXFORD *v.* PROVAND - - 135

STAKEHOLDER, action against: *See* HORSE RACE.

STAYING EXECUTION IN COURT BELOW PENDING APPEAL. STACE *v.* GRIFFITH 420

STOPPAGE IN TRANSITU.] The forbearance or release of an antecedent claim is not a good consideration for an indorsement of a Bill of lading, so as to defeat an unpaid Vendor's right of stoppage *in transitu.*—*L. & S.*, carrying on business in *London* and *Hong Kong*, bought goods of *L.* and others, Merchants at *Manchester*, to be shipped to their firm at *Hong Kong*. The goods were on a ten months' credit, and it was agreed that remittances of proceeds of the sales should be made from *Hong Kong* to meet the acceptances of *L. & S.* given for the price of the goods, on receipt of the Bills of lading. *L. & S.* contracted for the carriage, and shipped the goods in a Vessel they engaged, and the Bills of lading deliverable to their Firm in *Hong Kong*, or their assigns, were signed by the Master and handed over to *L. & S.*, who accepted the draft of the Vendors for the amount of the purchase. Before the goods or Bills of lading reached *Hong Kong*, *L. S. & Co.*, being insolvent, and pressed by two Banking Firms at *Hong Kong*, to whom they were largely indebted, in consideration of their debt to the Bank assigned to them the "whole of their property, premises, and chattels, specified in a schedule thereto, with all the estate, right, title, interest, claim, or demand of *L. S. & Co.*, arising thereout or therefrom." The schedule, *inter alia*, enumerated "All goods and Bills of lading, or other documents, for all goods now on the way hither." In pursuance of this agreement the Bills of lading were indorsed and handed over to the Banking Firms, to whom the insolvent circumstances of *L. S. & Co.* at that time were well known:—*Held*: First, that pre-existing debt was not a valuable consideration for the assignment, so as to defeat the right of the unpaid Vendors to stop the goods *in transitu*, and—Second, that the *transitus* had not ended before the arrival of the goods at *Hong Kong*, as the *transitus* continued while the goods were in charge of a third party, contracted with as Carrier for the purpose of forwarding them. RODGER *v.* THE COMPTOIR D'ESCOMPTE DE PARIS 393

STRIKING OFF THE ROLLS: *See* ATTORNEY.

SUBSTITUTION OF STOCK: *See* MORTGAGE OF SHEEP.

SUIT FOR WAGES: *See* JURISDICTION. 1.

SUIT IN ENGLISH ADMIRALTY COURT to recover damages for tort committed in a Foreign country will not lie if no such remedy as that sought is given by the English law. THE "HALLEY" - - - - - 193

SUSPENSION: *See* DEED.

TORT committed in Territory of Foreign State. Action for damages will not lie in English Court. THE "HALLEY" - - - - 193

TRADE.] Assuming name of firm or business: *See* FAMILY NAME.

USURY.] Exposition and examination of the Usury Laws of *Lower Canada*. Kierzkowski *v.* Dorion - - - - - - 291

VAGUENESS: *See* Specific Performance.

VENDOR AND PURCHASER: *See* Specific Performance; Stoppage in Transitu.

VENIRE DE NOVO: *See* Felony.

WAGES, SUIT AGAINST FOREIGN VESSEL: *See* Jurisdiction. 1.

WAIVER: *See* Ecclesiastical Law. 4.

WILL: *See* Colonial Law. 1, 7.

WINDING-UP: *See* Compromise.

WRIT DE VI LAICÂ REMOVENDÂ: *See* Ecclesiastical Law. 3; Jurisdiction. 4.

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LONDIN.
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LONDON:

PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.

OL 11/9/62